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DIGEST
OF
INTERNATIONAL LAW

BY
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VOLUME IV
CHAPTERS XII—XV



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CONTENTS

CHAPTER XII

Extradition:	Page
In General (§304)	1
Extradition a National Act (§305).	2
Extradition Without Treaty	11
Obligation (§306)	11
Legal Power (§307)	12
Extraterritorial Countries (§308)	16
Occupied Territory (§309)	19
Leased Territory (§310)	22
Deportation (§311)	30
Treaty Provisions	33
Operation and Effect (§312)	33
Construction (§313)	38
Extraditable Offenses	41
In General (§314)	41
Act Charged a Crime in Both Countries (§315)	42
Political Offenses (§316)	45
Escape Following Conviction (§317)	52
Nationals	55
Nationals of Asylum State (§318)	55
Nationals of a Third State (§319)	55
Jurisdiction (§320).	69
Accusation or Warrant of Arrest (§321)	76
Procedure	77
Requisitions (§322)	77
Magistrates (§323)	92
Preliminary Mandate (§324)	93
Complaint (§325)	96
Provisional Arrest and Detention (§326)	103
Hearing (§327)	115
Evidence.	130
Documentary Proof (§328)	130
Certification and Authentication (§329)	142
Evidence in Defense (§330).	150
Weight and Effect of Evidence (§331)	156
Rearrest (§332)	163
Bail (§333)	166
Review (§334)	171
<i>Habeas Corpus</i> (§335)	174
Escape Following Arrest (§336)	182
Legal Assistance (§337)	184
Surrender	186
An Executive Function (§338)	186
Obstacles to Surrender (§339).	194
Articles in the Possession of the Accused (§340).	204

Extradition—Continued.	
Surrender—Continued.	Page
Removal of Accused From the Country (§341)	207
Recall of Warrant (§342).	215
Transit (§343)	216
Prosecution in Lieu of Surrender (§344)	221
Irregular Recovery of Fugitive (§345)	224
Expense (§346)	228
Trial of Accused (§347)	232
Civil Suits (§348)	239

CHAPTER XIII

International Communications:	
Electrical Communications	243
Submarine Telegraph Cables	243
Protection (§349)	243
Landing Licenses (§350)	247
Cable Concessions Abroad (§351)	256
Cables in Time of War (§352)	266
Radio (§353)	274
Regulation of Use	297
Secrecy (§354)	297
Rates (§355)	298
Routing of Messages (§356)	299
Codes (§357)	300
Censorship and Control (§358)	301
Postal Communications	323
International Organization (§359)	323
Postal Conventions (§360)	329
General Postal Relations (§361).	331
Maritime Navigation (§362)	337
Inland Transportation (§363).	344
Freedom of Transit (§364)	353
Aviation	357
Sovereignty Over Air-Space (§365)	357
Public Air Law (§366)	359
Private Air Law (§367)	369
Bilateral Agreements (§368)	383
Laws and Regulations of the United States (§369).	387

CHAPTER XIV

Intercourse of States:	
Diplomatic Missions.	393
Ambassadors and Ministers (§370)	393
Chargés d'Affaires (§371).	398
Counselors and Secretaries (§372)	400
Attachés (§373).	401
Commissioners (§374)	409
Special Envoys (§375)	412
Agents (§376).	415
Representatives of Unrecognized and Fallen Governments (§377)	415
Members of International Bodies (§378)	419

CONTENTS

v

Intercourse of States—Continued.

Diplomatic Missions—Continued.	Page
Union of Consular and Diplomatic Functions (§379)	423
Diplomatic List (§380)	429
Beginning and End of Mission	434
Appointments (§381)	434
Credentials and Reception	439
Letters of Credence (§382)	439
Presentation of Letters of Credence (§383)	442
Letters of Recall (§384)	444
Acceptability of Ambassador or Minister (§385)	446
Nationality as Obstacle to Reception (§386)	452
End of Mission (§387)	454
Rights and Duties of Diplomatic Representatives	459
Transit (§388)	459
Residence at Capital (§389)	466
Instructions (§390)	467
Support of Private Interests (§391)	468
Notarial Powers (§392)	469
Non-interference in Politics (§393)	472
Speeches (§394)	474
Presents (§395)	475
Good Offices in Time of Peace (§396)	485
Good Offices in Behalf of Belligerents (§397)	498
Right to Protection of Person (§398)	507
Right to Protection of Property (§399)	511
Diplomatic Immunities	513
Exemption From Judicial Process	513
In General (§400)	513
Criminal Process (§401)	515
Civil Process (§402)	533
Giving of Testimony (§403)	551
Personal Property (§404)	555
Premises (§405)	562
Taxation.	566
Income Taxes (§406)	566
Excise Taxes (§407)	570
Taxes on Real Property (§408)	576
Taxes on Personal Property (§409)	582
Customs (§410)	586
Other Taxes (§411)	593
Miscellaneous Cases (§412)	596
Official Communication	604
Department of State as Official Channel (§413)	604
Diplomatic Correspondence (§414)	611
Pouches (§415)	619
Couriers (§416)	621
Franking Privilege (§417)	623
Correspondence in Time of War (§418)	624
Ceremonial.	632
Rules of Precedence (§419)	632
Social Intercourse (§420)	639
Executive Control of Foreign Relations (§421)	642
Use of Official Documents (§422)	652

CHAPTER XV

	Page
Consuls:	
Appointment and Classification (§423)	655
Recognition of Consuls	666
Granting of Recognition (§424)	666
Effect of Exequatur (§425)	671
Revocation of Exequatur (§426)	673
Unrecognized Governments (§427)	684
Privileges and Immunities	699
Under International Law (§428)	699
Under Treaties (§429)	701
In Near Eastern Countries (§430)	706
Protection Due Consular Officers (§431)	708
Protection of Office and Dwelling (§432)	716
Protection of Archives (§433)	722
Amenability to Local Jurisdiction	726
Civil Process (§434)	726
Criminal Process (§435)	736
Jurisdiction of Courts in United States (§436)	746
Giving of Testimony (§437)	753
Taxation (§438)	774
Powers and Duties	806
Scope and Limitation (§439)	806
Correspondence (§440)	815
Protection of Interests of Fellow Nationals (§441)	824
Notarial Services (§442)	838
Administration of Estates (§443)	855
Abstention From Politics (§444)	873
Duties With Respect to Seamen	876
Jurisdiction (§445)	876
Who Are American Seamen (§446)	883
Shipment (§447)	885
Discharge (§448)	886
Offenses (§449)	903
Relief	912
In General	912
Nature of Relief (§450)	912
Seamen Entitled to Relief (§451)	913
Wages and Relief (§452)	917
Relinquishment of Relief (§453)	917
Prerequisite Action by Consul (§454)	921
Primary Duty of Vessel (§455)	923
Transportation (§456)	928
Problems Peculiar to Various Classes of Seamen	931
Destitute Seamen (§457)	931
Ill or Injured Seamen (§458)	935
Shipwrecked Seamen (§459)	945
Fees (§460)	947

CHAPTER XII

EXTRADITION

IN GENERAL

§304

Extradition is that process by which fugitives from the justice of one state who seek asylum in another state are delivered up by the latter to the former. It applies to fugitives who have committed offenses and have escaped prior to trial as well as to those who have been tried and convicted and have escaped from custody. It has been defined by the Supreme Court of the United States as "the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender". *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

Extradition must not be confused, so far as the law of the United States is concerned, with interstate rendition under article IV, section 2, of the Constitution, which provides:

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Extradition by the United States to foreign countries is exclusively a prerogative of the Federal Government, but the exercise thereof is dependent entirely upon treaty or legislative provision as "the Constitution creates no executive prerogative to dispose of the liberty of the individual", and it "is not enough that statute or treaty does not deny the power to surrender". *Valentine, Police Commissioner of New York City, et al. v. United States ex rel. B. Coles Neidecker*, 299 U.S. 5, 9 (1936). The United States has provided for extradition both by treaty and by legislative provisions. Section 5270 of the Revised Statutes contains specific provisions with respect to the apprehension, surrender, etc., of persons who have committed, within the jurisdiction of any foreign government, crimes which are made extraditable by treaty or convention between that government and the United States.

International law recognizes no right to extradition apart from treaty. *Factor v. Laubenheimer*, U.S. Marshal, 290 U.S. 276, 287 (1933). Yet, all states must be presumed to be interested in the administration of justice. They are interested in obtaining the return of fugitives from their own jurisdictions and, generally speaking, can hardly be said to have an interest in keeping within their jurisdictions fugitives from the justice of other states. Treaties, however, generally except from their operation political offenses and contain special provisions concerning the extradition of nationals of the contracting parties.

A state usually will decline to extradite pursuant to the provisions of a treaty containing a list of extraditable offenses unless the offense charged is enumerated in the list.

EXTRADITION A NATIONAL ACT

§305

In the case of *Valentine*, Police Commissioner of New York City, et al. v. *United States ex rel. B. Coles Neidecker*, the Supreme Court of the United States stated:

It cannot be doubted that the power to provide for extradition is a national power; it pertains to the national government and not to the States. *United States v. Rauscher*, 119 U.S. 407, 412-414. But, albeit a national power, it is not confided to the Executive in the absence of treaty or legislative provision.

290 U.S. 5, 8 (1933).

Extradition proceedings must be prosecuted by the foreign government in the public interest, and may not be used by a private party for private vengeance or personal purposes.

President of the United States ex rel. Caputo v. Kelly, *United States Marshal, et al.*, 92 F. (2d) 603, 605 (C C A 2d, 1937).

Request
by local
authorities

The American Chargé d'Affaires ad interim at Buenos Aires telegraphed to the Secretary of State on January 22, 1908 stating that the Governor General of the Philippine Islands had requested of the Argentine Government the provisional arrest of Ross W. Douglass, charged with the crimes of embezzlement and forgery, but that the Argentine Government refused to act without the request of the Department of State. At the instance of the Governor General the Department instructed the Chargé d'Affaires to present such a request.

The Chargé d'Affaires ad interim (Wilson) to the Secretary of State (Root), telegram of Jan. 22, 1908, and Mr. Root to Mr. Wilson, telegram of Jan. 23, 1908, MS Department of State, file 6830/6

Candido Aguilar telegraphed, on May 14, 1921, to the Department of State, stating that he and Antonio Romero had been arrested in Marathon, Texas, at the request of Mexican authorities and that they had been notified that they would be turned over on that day to those authorities, against which action they protested. The Secretary of State telegraphed to the Governor of Texas, stating:

This Government is not now conducting extradition proceedings with Mexico so that the arrests can evidently serve no purpose at this time. You are doubtless aware of the fact that in any event the Federal Government only has the legal authority to surrender fugitives from Mexico to that country.

Department would appreciate your taking prompt action to prevent possible embarrassing mistake by local authorities.

Candido Aguilar to the Under Secretary of State (Fletcher), May 14, 1921, and Secretary Hughes to Governor Neff, May 14, 1921, MS. Department of State, file 211.12Ag3/-.

The Ambassador of France in Washington, in a note dated January 11, 1907, informed the Secretary of State that the police inspector of New York had applied to the prosecuting attorney's office at Montbelliard, France, for the arrest of Gabriel Hilt and Louise Louys. It was added that the French authorities were quite willing to effect the arrest but that in order to do so they must have a regular complaint lodged by the Federal Government. A copy of the Ambassador's note was transmitted to the Governor of New York.

Ambassador Jusserand to Secretary Root, Jan. 11, 1907, and Acting Secretary Bacon to Governor Hughes, Jan. 12, 1907, MS. Department of State, file 3773.

The American Ambassador at London reported to the Department of State on October 17, 1907 that London police received from time to time from various police officials throughout the United States circulars and other communications concerning the extradition of alleged criminals for whose arrest rewards were offered. It was added that such communications caused embarrassment and delay as the authorities in London were obliged to refer them either to the American Consul General or to the Ambassador in order to ascertain the wishes of the governors of the several States. The police authorities in London requested that the American police authorities be instructed to add to their circulars the words that "on arrest extradition will at once be applied for by the United States Government". The Department referred the matter to the president of the National Police Association and stated that—

the Department . . . fails to see how the local police authorities throughout the United States are competent to give the

assurance that extradition will be applied for by the United States Government except in those cases where application has already been made to this Department, and favorably passed upon by it. The authority to give this assurance is vested in the Department of State, and requests upon a foreign government for an extradition are made by it only when an extraditable crime has been committed, and evidence furnished which is sufficient to support the request for extradition. When these conditions exist, the Department takes immediate action as soon as the case is regularly called to its attention by the proper authorities, that is, by the governor of the state or territory when the offense has been committed against state or territorial law, or the Attorney General of the United States when the offense is a violation of federal law.

Of course an assurance could be given that "on arrest, extradition will at once be applied for to the United States Government," but there might be some question as to what effect, if any, such an assurance would have; or you may consider it practicable to set out in the circular the text of the particular treaty clause covering the offense for which extradition is to be sought, as well as to state that, in the opinion of the police authorities, there is sufficient evidence to support a request for extradition, and that application has been made to the Department of State for the extradition of the fugitive, or that immediate steps will be taken to make such application, as soon as notification is received of the fugitive's arrest.

Ambassador Reld to Secretary Root, Oct. 17, 1907, and Assistant Secretary Bacon to Major Sylvester, Nov. 12, 1907, MS. Department of State, file 9646.

**Action by
consuls**

In transmitting to the general superintendent of police of Chicago a letter addressed to him by the American Consul at Trieste, Austria, in reply to a request by the superintendent for the arrest of Pisto Dzodzo, charged with murder, the Department of State said:

... consular officers are not authorized to intervene in extradition matters nor to ask for the arrest and detention of the fugitive, except when specifically authorized by the Department and the Consul has, therefore, been informed that his action in this matter was incorrect and has not the approval of the Department.

The Chief Clerk of the Department of State (Carr) to George M. Shippy, Nov. 30, 1907, MS. Department of State, file 10000/-1.

The American Consul General at Marseille, France, telegraphed the Secretary of State on July 9, 1907:

Boghos Sakaian arrested solicitation New York authorities addressed Marseille police. I have asked detention informally pending arrival papers. Hope action approved. Murder charged. Identity admitted.

The written despatch from the Consul General bearing the same date explained that the arrest had been made on Saturday night, when effective communication with the Department of State would have been impossible, and that the accused was at that time about to depart for Bulgaria. The Department replied:

I . . . inform you that under the peculiar circumstances of this case the Department does not consider it just to disapprove your action in causing the arrest of the suspect, in view of the fact that it was apparent that any action, to be effective, had to be taken at once. If, however, you are again called upon for action in a similar case you should telegraph your action immediately to the Department.

Consul General Skinner to Secretary Root, July 9, 1907, MS. Department of State, file 7536; Mr. Skinner to the Assistant Secretary of State, July 9, 1907, and the Chief Clerk of the Department of State (Carr) to Mr. Skinner, July 28, 1907, *ibid.* /4.

The several States of the United States do not possess the right or the power to surrender to foreign governments fugitives from justice. This authority belongs exclusively to the national Government. Occasionally, however, the question is considered by the Department of State in connection with extradition proceedings instituted under article IX of the extradition convention concluded on February 22, 1899 between the United States and Mexico (31 Stat. 1818, 1824; 1 Treaties, etc. [Malloy, 1910] 1184, 1188), which provides in part as follows:

In the case of crimes or offenses committed or charged to have been committed in the frontier states or territories of the two contracting parties, requisitions may be made either, through their respective diplomatic or consular agents as aforesaid, or through the chief civil authority of the respective state or territory, or through such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier states or territories, or when, from any cause, the civil authority of such state or territory shall be suspended, through the chief military officer in command of such state or territory, and such respective competent authority shall thereupon cause the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination.

Border
states

Claude Pollard, of the Department of the Attorney General of Texas, wrote to the Department of State on October 29, 1906, as follows:

The proper diplomatic channel of the State of Coahuila, Mexico, informed by telegraph the Governor of the State of Texas that a warrant had been issued by competent authority for the

arrest of about twenty parties, citizens of Mexico, charged with the offense of murder and robbery, in said State of Coahuila, Mexico, and the Governor of Texas, upon being assured that a requisition for the surrender of said parties was about to be made, procured the provisional arrest of eight of said parties who are now in the custody of one of the sheriffs of this State. Since the arrest a requisition in proper form has been received by the Governor of Texas from the Governor of Coahuila, Mexico. The Governor of Texas has designated a District Judge of the State, who is a proper judicial authority, under the United States Statutes, to make an examination as to the facts affecting the criminality of the parties.

I desire to be advised as to whether or not, under the provisions of articles 9 and 10 of the Treaty, construed in connection with the U. S. Statutes relating to the procedure of carrying to effect the Treaty of the United States, it is necessary, in order to give the District Judge Jurisdiction, to conduct the judicial examination, that a complaint be filed before him, properly sworn to, and a warrant of arrest be issued by him?; or will he have jurisdiction to make the judicial examination and report his findings to the Governor by reason of his appointment to do such by the Governor?

The Acting Secretary of State replied :

Article 10 of the treaty between the United States and Mexico provides that "each *government*" shall endeavor to procure the provisional arrest and detention of fugitives from justice upon being given certain assurances "*through the diplomatic channel.*" As the Department understands these terms, the "government" referred to by the treaty is the government of the contracting parties, in this case the United States Government, and the "diplomatic channel" specified therein must likewise refer to the diplomatic officers of the two governments. . . .

Upon an examination of article 9 of the treaty, we find certain provisions for procuring extradition without the possible delay of recourse to the diplomatic channel. So far as these provisions are operative, and so far as they prescribe a procedure to be followed in obtaining an extradition, they are to be observed, in lieu of prior statutory provision. Where they fail in their end, through lack of specific provision or otherwise, the general laws of the United States should be consulted to supply the deficiency of the treaty.

It does not appear from your letter what method of procedure was adopted by the Governor of Texas to secure the provisional arrest of the fugitives, but, following the analogy obtaining in similar cases where the Federal government is called upon to act, it is presumed that the Governor, pursuant to article 9 of the treaty of extradition giving him the authority to "cause the apprehension of the fugitive," has instructed his attorney general to make an appropriate complaint and cause a warrant to be issued for the arrest of the accused. The treaty does not specify to what authority it is necessary to apply in order to make a proper complaint, and in the absence thereof, the Department is of the opinion that the provisions of the Revised Statutes should be consulted to sup-

ply this omission. Section 5270 specifies the different officers who are authorized to hear complaints and issue warrants in extradition cases. Among those so authorized is "a judge of a court of record of general jurisdiction of any state." The Governor of Texas has appointed such an officer to assume jurisdiction in this case. Although it is not stated in what manner the arrests have been made, it is assumed that the fugitives are held by due process of law.

Article 9 further provides that the accused are to be "brought before the proper judicial authority for examination". This authority undoubtedly has the power, if necessary, to issue warrants of arrest in extradition cases upon complaints made before him, but if the fugitives are already incarcerated under proper legal process it would be quite unnecessary to re-arrest them. In the absence of more specific information as to the manner of making the arrests in question, if the Department's assumptions as above set forth are correct, it is of opinion that it will be unnecessary for the judge who has been appointed by the Governor to conduct the examination of the fugitives to issue warrants for their arrest in order to give him jurisdiction in the premises.

Mr. Pollard again wrote to the Department on November 13, 1906, presenting certain questions as follows:

1. Has the judicial authority conducting the examination any jurisdiction to discharge, if it is his opinion that the evidence is insufficient to authorize the extradition?
2. Should "the record of such examination, with the evidence duly attested", be forwarded to the Governor of Texas, or to the Secretary [of State] of the United States?
3. Is not the jurisdiction to pass upon the law and the evidence given exclusively to the proper executive authority under this Article [IX] of the Treaty?

Article 8 gives jurisdiction to decide the law and the sufficiency of the evidence, to the proper judicial authority making the examination. Article 9 apparently gives the jurisdiction to decide the questions of law and evidence to the executive authority, the only duty imposed upon the judicial authority, being the conducting of the examination and certifying the record of such examination to the proper executive authority.

These questions have never arisen in so far as any extradition proceedings between Texas and the Border States of Mexico, therefore, I would be glad to hear from you upon these questions.

Is the question of whether or not the offense is political, one to be decided by the judicial authority, or by the executive authority?

The Secretary of State replied on November 30, 1906:

Inasmuch as the Department has been informed that the Governor of Coahuila has withdrawn his request upon the Governor of Texas for the extradition of the fugitives in question, it is

assumed that the emergency presented in your letter has disappeared.

Regarding one question raised in your letter, the Department is of opinion that a practice of some years standing, if presented to a court in a proper case, might be reversed. The question to which reference is made is to the practice, now in vogue, of surrender in "frontier-state" cases, of fugitives by the governor of the state to which the fugitive has fled. Article IX of the treaty distinctly states that after a fugitive has been examined by the extradition magistrate the record of the proceedings shall be forwarded "to the proper executive authority of the United States of America," who shall deliver up the fugitive according to the forms of law.

This opinion is confirmed by an examination of the records of the Department and of the correspondence with the Mexican Government which led to the adoption of Article IX in its final form.

It is true that the Department has heretofore stated (in a letter dated October 24, 1900, to S. T. Foster, Esquire, United States Commissioner and Extradition Agent for the Western District of Texas) that the intent of the contracting parties in this class of cases was that the record of the proceedings should be forwarded to the State and not to the Federal executive; and it seems to be the fact that no case has been found in recent years where the record of the proceedings in "border-state" cases has been forwarded by the extradition magistrate to this Department for review. But in the light of the plain provision of the treaty that the record of the examination shall be forwarded to "*the proper executive authority of the United States of America*," the Department is impelled to the conclusion that the substitution of the State Executive for the Federal executive in the proceedings incident to the surrender of the fugitive would not stand analysis in a court of law. It is of opinion that if a fugitive raised the objection upon habeas corpus that he had been delivered up by the Governor of a *state*, and not by the executive authority of the United States, he would probably secure his release.

Regarding the question whether the examining magistrate before whom a fugitive may be brought, under Article IX of the treaty, is authorized to hear the evidence, pass upon its sufficiency, and discharge or commit a prisoner for surrender, the Department thinks that this is a matter for judicial determination, and that it would therefore be unnecessary to express an opinion thereon; but until such a question arises, it would advise, as the most consistent practice to follow in view of the procedure prescribed by the other articles of the treaty, that the examining magistrate acting under Article IX of the treaty should receive and hear the evidence of criminality in the first instance; if he should decide that the evidence is not sufficient to justify commitment for surrender, or if he should be of opinion for some other reason that the case does not fall within the treaty, or that it comes within one of the exceptions mentioned in the treaty, such as the exemption from surrender of political offenders, then he may order the

release of the fugitive; otherwise he should commit the fugitive to the custody of the marshal and forward a transcript of the record of the proceedings had before him to the Secretary of State of the United States. The Secretary of State will then review the findings of the magistrate and issue a warrant for the surrender of the fugitive, if in the Department's opinion a case has been made out calling for his surrender; otherwise the Department will direct the marshal to release the prisoner from custody.

Claude Pollard to Secretary Root, Oct. 29, 1906, and Acting Secretary Bacon to Mr. Pollard, Nov. 6, 1906, MS. Department of State, file 2052; Mr. Pollard to Mr. Bacon, Nov. 13, 1906, and Mr. Root to Mr. Pollard, Nov. 30, 1906, *ibid.* 2052/1.

Under date of the 1st instant the District Attorney of El Centro, California, addressed this Department [the Mexican Department of Foreign Affairs] by wire, requesting the detention at Mexicali of Praxedis Moreno, charged with the murder of his wife at Calexico. A reply was given to the above officer advising him that proper orders had been issued, which was done, to the end that the fugitive be kept under surveillance, as his detention could not be ordered because, according to the Treaty, the request should come through the diplomatic channels.

The Mexican Minister of Foreign Affairs (Mariscal) to the American Ambassador (Thompson), Dec. 30, 1907, MS. Department of State, file 11142.

Section 5 of the act of Congress, approved July 5, 1932, provides:

The demand for the arrest and delivery of a fugitive from the justice of the Republic of Panama, pursuant to the terms of this Act, will be complied with when made in writing and signed by the Secretary of Foreign Relations of the Republic of Panama, or by his direction, and presented to the Governor of the Panama Canal. If the demand is for a condemned and fugitive criminal, it must be accompanied by a duly certified copy of sentence pronounced by a court of competent jurisdiction, and, as far as possible, a description of the fugitive sought to be reclaimed.

Panama
Canal
Zone

47 Stat. 574, 575; 6 Canal Zone Code §885. See also Executive order issued by the Governor of the Canal Zone on Sept. 19, 1906, MS. Department of State, file 6357/3-6.

The American Consul at Nagasaki, Japan, was requested on May 4, 1907 by the Governor General of the Philippine Islands to arrest and hold for extradition Ross W. Douglass, a disbursing clerk for the Signal Corps, who was charged with forgery and embezzlement. The Consul replied that application for the arrest of Douglass should be made through the American Ambassador at Tokyo. In reporting the matter to the Department of State, the Consul stated:

Philippine
Islands

At the same time I wrote to the Governor of Nagasaki Ken, stating that Douglass, charged as a defaulter, is supposed to have

fled from the Philippine Islands to Nagasaki, that application for his arrest and extradition will probably be made promptly through the proper diplomatic channels; and that meanwhile I requested that the local police be instructed to watch for him and keep me advised of his movements should he visit Nagasaki.

I have also made a full report of this correspondence and of my action to the American Ambassador at Tokyo.

The action of the Consul was approved.

Consul Scidmore to the Department of State, May 4, 1907, and the Chief Clerk of the Department of State (Carr) to Mr. Scidmore, July 5, 1907, MS. Department of State, file 6830/-2.

British
protectorates

In announcing to the Secretary of State, on September 7, 1909, that legislative enactments had been passed in the various British protectorates on the African Continent for the extension of the provisions of the extradition treaties between the United States and Great Britain to such protectorates, the British Ambassador said:

... Owing to British protectorates not being, strictly speaking, British dominions, and the British extradition acts consequently not being the municipal law of such territories, the absence of the necessary legal machinery has so far precluded the surrender of fugitive criminals between British protectorates and foreign states and their dependencies.

I have, however, to explain that the natives of these protectorates are not by the mere fact of birth within their limits British subjects, and consequently the provisions in the treaties which His Majesty's Government have concluded, and which in some cases altogether preclude and in others leave the surrender of nationals optional, would not, in the absence of some-specific understanding, apply in strictness to natives.

His Majesty's Government, however, contemplate assimilating the position of natives to that of British subjects for the purposes of these treaties, and they apprehend that the United States Government will readily assent to this course.

I have accordingly the honour under instructions from His Majesty's Principal Secretary of State for Foreign Affairs to bring this information to your notice and to intimate that a reply to the effect that the United States Government have taken due note of its contents will be sufficient to give due effect to the understanding without any further formality.

The Ambassador appended to his note the following list of the protectorates in question:

Bechuanaland protectorate, East African protectorate, Gambia protectorate, Northeastern Rhodesia, Northwestern Rhodesia, Northern Nigeria, Northern Territories of the Gold Coast, Nyasaland, Sierra Leone protectorate, Somaliland protectorate, South-

ern Nigeria protectorate, Southern Rhodesia, Swaziland, Uganda protectorate.

The Acting Secretary of State replied that "the Department has taken due note of the contents of your note and of the intimation therein contained".

The British Ambassador (Bryce) to the Secretary of State (Knox), no. 238, Sept. 7, 1909, and Acting Secretary Adee to Mr. Bryce, no. 732, Sept. 23, 1909, MS. Department of State, file 2624/15-16. See also 1909 For. Rel. 286.

The American Ambassador to Germany enclosed with a despatch dated Mar. 20, 1915 a copy of a *note verbale* from the Foreign Office, from which it appeared that the German Government held that the extradition convention concluded on June 16, 1852 between the United States and Prussia and other states of the German Confederation did not extend to the German colonies and protectorates. Ambassador Gerard to Secretary Bryan, Mar. 20, 1915, MS. Department of State, file 21162/5. 2 Treaties, etc. (Malloy, 1910) 1501; 10 Stat. 964.

EXTRADITION WITHOUT TREATY

OBLIGATION

§306

There is some authority to the effect that a moral duty rests upon every government, even in the absence of a treaty, voluntarily to surrender a fugitive from justice to the country from which he has fled. However, in the case of *Greene, et al. v. United States*, the court stated:

The modern view and the one maintained in this country, is that a state is under no obligation to surrender fugitives accused of crime unless it has contracted to do so.

154 Fed. 401, 410 (C.C.A. 5th, 1907).

The prosecuting attorney at Seattle, Washington, inquired of the Secretary of State in 1907 whether an absconding city official could be extradited from Honduras. The Acting Secretary of State replied:

In absence of treaty, extradition cannot be demanded as of right. If Governor of Washington will so request, Department will ask for extradition as an act of comity. Doubtful whether favorable reply will be obtained since Department's request must be coupled with statement of inability to reciprocate in a similar case on account of our laws, and unsettled conditions in Honduras may cause delay in any event.

The matter finally was taken up with the American Minister to Honduras and El Salvador, who telegraphed on November 28, 1908:

Government of Honduras has ordered provisional arrest and detention of Riplinger and Simmonds, who, if found, will be delivered upon presentation of duly authenticated documents showing charges against them.

The prosecuting attorney of Seattle (Mackintosh) to the Secretary of State (Root), telegram of May 7, 1907, and Acting Secretary Bacon to Mr. Mackintosh, telegram of May 9, 1907, MS Department of State, file 6343; Minister Dodge to Mr. Root, telegram of Nov. 28, 1908, *ibid.* 6343/10

. . . the principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so, (see 1 Moore, Extradition, §14; Clarke, Extradition, 4th ed., p. 14) the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty. . . . To determine the nature and extent of the right we must look to the treaty which created it. The question presented here, therefore, is one of the construction of the provisions of the applicable treaties in accordance with the principles governing the interpretation of international agreements.

Factor v. Laubenheimer, U.S. Marshal, et al., 290 U.S. 276, 287 (1933).

LEGAL POWER

§307

Section 5270 of the Revised Statutes of the United States (18 U.S.C. § 651) provides:

Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, or commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, District, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered.

One of the rules of practice observed in the United States is that, in the absence of a conventional or legislative provision, there is no

authority vested in any department of the Government to seize a fugitive criminal and deliver him to a foreign power.

Ex parte Reed, 158 Fed 891, 892 (D C, N.J., 1908).

Extradition proceedings under section 651 of title 18 of the United States Code must be taken in conformity with law, and no one may be detained under them unless for an offense denounced as a crime by the law of the asylum state and covered by the treaty of extradition in force between the asylum and the demanding states.

Villarcal, et al. v. Hammond, Marshal, 74 F. (2d) 503, 505 (C.C.A. 5th, 1934).

In 1906 the Argentine Government requested and obtained from France the extradition of Frederick Lodge Jacobs, an American citizen charged with fraudulent bankruptcy. When the accused appealed to the American Consul at Marseille for protection on account of the condition of the place in which he was incarcerated and on account of the delay on the part of the French authorities in granting a hearing as provided by French law, the Department of State instructed the Ambassador at Paris to say to the Minister of Foreign Affairs, if the proceedings which were being taken were based only upon comity, that the Government of the United States held the view that it had just as strong a claim to consideration by the Government of France in requesting adequate protection for an American citizen as the Argentine Government had to obtain his surrender.

The Minister of Foreign Affairs of France replied that—

international legislation concerning extradition, is regulated in France by conventional texts which deal in total with such or such category of infringements and by exchanged declarations of reciprocity with reference to a special case and which carry, nevertheless not less strict obligations than treaties. Now it is precisely on the ground of reciprocity that the Argentine authorities have asked us, in view of his extradition, the arrest of said Jacobs.

As to the duration of the preventive detention incurre[d] by him, it is customary between civilized States, and in matters of extradition, that the arrest of the accused be proceeded with on telegraphic advice, as he could escape the action of justice by flight were it necessary, to apprehend him, to await the effective production of the warrant for the arrest delayed in this instance by a twenty days[?] journey from Buenos Ayres.

Here then are circumstances where a general interest of security and social assistance can permit of an accidental giving away to the prerogatives of individual liberty.

We cannot, however, remain much longer without being provided with the necessary documents which, according to a quite recent communication from the Argentine Legation, were despatched on the 20th of December last.

While not losing sight of the interest you attach to the settlement of this affair, I should add, much to our great regret, that it is impossible for us to oppose to the Argentine Republic, the presumed nationality of the accused.

The French Minister of Foreign Affairs (Pichon) to the American Ambassador (McCormick), Dec. 28, 1906, MS. Department of State, file 3294/9.

In 1906 the Acting Attorney General wrote to the Secretary of State enclosing a copy of a letter from the assistant United States attorney for Oregon inquiring whether, in the absence of an extradition treaty, an application would be entertained for the extradition from China of a person convicted in the United States Court for Oregon on the charges of conspiracy to defraud the United States and of making and forging an affidavit relating to the public lands. The Secretary of State replied:

In . . . the absence of an extradition treaty with China, this Department cannot, as a matter of right, ask that government for the surrender of any person accused or convicted of crime in the United States who is now within Chinese territorial jurisdiction.

The Department has, however, in occasional instances, asked its diplomatic officers accredited to countries with which we had no extradition treaties, to request the surrender of fugitives as an act of comity; but our request has always been accompanied by a distinct statement that this country would be unable to reciprocate the favor, should an occasion arise. . . .

If the Department of Justice will request it, this Department will instruct the American Minister at Peking to inquire of the Chinese Foreign Office whether a request made under the circumstances set forth in the letter of the Assistant United States Attorney at Portland would be honored by the Chinese Government.

The Acting Attorney General (Hoyt) to the Secretary of State (Root), Nov. 12, 1906, and Mr. Root to Mr. Hoyt, Nov. 26, 1906, MS. Department of State, file 2290/1.

The American Consul General at Chefoo, China, in a telegram dated August 13, 1907, informed the Secretary of State that at the request of the British Consul he had arrested William H. Adsetts, an American citizen charged with murdering another American at Hong Kong. He added that there was sufficient evidence of criminality, and he accordingly requested authority to surrender the accused to the Hong Kong Government. The Acting Secretary of State replied that the Department was not competent under existing law to authorize such surrender; that if Adsetts had committed any crime over which the American courts in China had jurisdiction he should be proceeded against in accordance with law; and that the matter should be brought to the attention of the United States Court for China.

Later the American Consul General at Shanghai sent a telegram to the Secretary of State, stating that the accused had been placed aboard the U.S.S. *Galveston* as a prisoner, and suggested that the *Galveston* be ordered to Manila, there to release the prisoner, who could then be extradited to Hong Kong. As an alternative he suggested that the United States Court for China try the prisoner for an assault made upon a British constable who had arrested him, and, if the accused should be convicted, he could then be transferred to California whence he might be extradited to Hong Kong on the charge of murder.

The Consul General at Chefoo informed the Secretary of State, on September 13, 1907, that Adsetts, who had been given a hearing before the Consul General, was returned to the *Galveston* on September 7 and that the vessel had sailed on the same day for Manila. Although the file does not disclose that Adsetts was surrendered by the Secretary of State, he was returned to Hong Kong and placed on trial on October 21, 1907. Adsetts was convicted and later executed.

The Consul General at Chefoo (Fowler) to the Secretary of State (Root), telegram of Aug. 13, 1907, MS. Department of State, file 8024; the Acting Secretary of State (Adee) to Mr. Fowler, telegram of Aug. 16, 1907, *ibid.* 8024/1; the Consul General at Shanghai (Bassett) to Mr. Root, telegram of Aug. 22, 1907, *ibid.* /2; Mr. Fowler to Mr. Root, telegram of Sept. 13, 1907, *ibid.* /4.

With regard to the question which you ask, namely, whether this Department will enter into negotiations with a country with whom we have no extradition treaty, for the purpose of having a fugitive delivered to the United States, the Department has to inform you that a difficulty in such procedure arises owing to the following circumstances: It not infrequently happens that extraditions are secured between countries, as a matter of comity, upon the simple assurance made by the government requesting the proposed surrender of the fugitive that in case that Government is called upon to reciprocate the favor, it will do so. In the United States, however, the principle is a well established one that no person can lawfully be extradited in the absence of an extradition treaty; hence the United States cannot give any assurance of reciprocity to a government with which it has no treaty of extradition in force.

Nevertheless the Department has in special instances requested of a foreign government with which we have no treaty in force, the extradition of a fugitive as an act of comity, but it has been compelled to couple its request with a statement that owing to the laws of the United States the Department would be unable to reciprocate the favor should the occasion arise. The consent of foreign governments under such circumstances has been very rarely obtained, and so far as Costa Rica is concerned the United States in times past made an inquiry as to how a request for surrender as an act of comity would be received and obtained an unfavorable reply.

Representative Ryan to Secretary Root, Oct. 9, 1907, and Acting Secretary Bacon to Mr. Ryan, Oct. 16, 1907, MS. Department of State, file 9102.

When it was ascertained that Winthrop E. Broad, charged in New York with larceny, was residing in Costa Rica, the Minister at San José was instructed on August 27, 1908 to ascertain whether—

Costa Rican Government still willing as an act of grace to surrender Broad while clearly understanding that this Government is not able to reciprocate.

The Minister replied :

Costa Rican President, with regret, decides that without reciprocal agreement must decline the extradition.

Please send by mail for Legation of the United States, explanation for your inability reciprocal agreement.

The Department informed the Minister that—

Revised Statutes fifty-two seventy et seq. do not authorize surrender of fugitives by this Government except pursuant to extradition treaty. See Moore Extradition page twenty-one.

The Acting Secretary of State (Adee) to the Minister at San José (Merry), telegram of Aug 27, 1908, MS. Department of State, file 7658/17; Mr. Merry to Secretary Root, telegram of Aug 28, 1908, and Mr. Adee to Mr. Merry, telegram of Aug 29, 1908, *ibid.* /18.

EXTRATERRITORIAL COUNTRIES

§308

The United States has not had a treaty of extradition with any country in which it exercised or now exercises extraterritorial jurisdiction, with the exceptions of Japan and the Ottoman Empire. Consequently it usually has not been possible to carry on extradition proceedings with those countries. In the absence of a treaty, American diplomatic and consular officers in extraterritorial countries are without authority to function in extradition, as such, notwithstanding the judicial authority otherwise exercised by them. Likewise, in the absence of a treaty, the processes of the United States Court for China cannot be invoked for purposes of extradition.

However, in view of the difficulties experienced in effecting the return from extraterritorial countries of fugitives from the justice of the United States, the Secretary of State recommended and the Congress enacted a statute, which was approved on March 22, 1934, providing for the removal of such fugitives, if citizens or nationals of the United States, between the United States, its territories, and possessions and such extraterritorial countries. The statute authorizes the "arrest and removal therefrom [where the United States exer-

cises extraterritorial jurisdiction] to the United States, its Territories, Districts, or possessions, including the Panama Canal Zone and the Philippine Islands, or any other territory governed, occupied, or controlled by it, of any citizen or national of the United States who is a fugitive from justice charged with or convicted of the commission of any crime or offense against the United States, and . . . the arrest and removal therefrom [the United States, etc.] to the jurisdiction of any officer or representative of the United States vested with judicial authority in any country in which the United States exercises extraterritorial jurisdiction, of any citizen or national of the United States who is a fugitive from justice charged with or convicted of the commission of any crime or offense against the United States in any country where it exercises extraterritorial jurisdiction”.

While the procedure prescribed is not, strictly speaking, that of extradition, the effect is substantially the same.

48 Stat. 454; 18 U.S.C. §662b.

Since no stipulation has been found in any of our treaties with China, which seems to be capable of being construed so as to confer any of the functions of extradition upon our diplomatic or consular officers, since there is not now and never has been any treaty of extradition in force between the United States and China, since it has been shown to be the practice of the Department, sanctioned by opinions of Attorneys General, not to make requests for extradition in the absence of a treaty, and since this practice has been followed in China, under the instructions of this Department, both before and after Minister Denby was our representative at Peking, it would seem to follow that Minister Denby's conclusions upon the subject as embodied in his report of 1889 are erroneous, and that, on the contrary, no power exists in our consuls in China to arrest and deliver up American citizens in China for crimes committed in the United States.

The Acting Attorney General (Hoyt) to the Secretary of State (Root), MS. Department of State, file 2290/1; memorandum of Solicitor for the Department of State (Scott), Nov. 17, 1906, *ibid.* /2.

After it had been ascertained, pursuant to a request made by the Acting Attorney General on Mar 6, 1907, that the Chinese Government would consider a request for the extradition of Horace G. McKinley, charged in Oregon with the crime of conspiracy to defraud, the Acting Attorney General wrote to the Department of State saying:

“ . . . your attention is invited to the inclosed copy of a letter addressed to the Attorney-General on the 20th ultimo by the United States Attorney for Oregon, in which he states that, in view of the recent law passed by Congress, establishing United States courts in China, full relief may be afforded to the United States for the extradition of McKinley through that court if it has jurisdiction over all American citizens residing in China.”

Santo Domingo, requested the extradition of Vallejo and that the Legation had stated that the United States had no power to deliver the absconder. The letter from the attorneys continued:

Inasmuch as Santo Domingo is occupied by and is under the control of the United States, we believe that the provisions of the Act of 6th June, 1900, being Chapter 793 of the laws of that session, (31 Stat. 656), amending Revised States [Statutes], Section 5270, apply to the situation, rather than the Extradition Treaty with the Dominican Republic referred to by Colonel Ramsey. That Act, so far as applicable, provides that

[“] Whenever any foreign country or territory or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein by the commission of larceny or embezzlement of an amount not less than \$100. in value, and who shall depart or flee, or who has departed or fled, from justice therein to the United States, any Territory thereof, or to the District of Columbia, shall when found therein be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the Military Governor, or other chief executive officer in control of such foreign country or territory, shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offence was committed.[”]

We beg leave to refer to the case of *Neely v. Henkel*, 180 U.S., 109, wherein the above Act was held applicable to extradition from the United States to Cuba, which was at the time occupied by United States forces.

It is unnecessary to point out to you the precarious position of our client, whose services are almost indispensable to persons doing business in the West Indies, if its Porto Rican employees in Santo Domingo can abscond with its money, knowing that in Porto Rico or in the United States they will be immune from punishment. . . . The Treaty of 1867 between the United States and the Dominican Republic provided for extradition without regard to the nationality of the offender. We can only guess at the reason for the insertion of Article VIII in the Convention of 1909, but it would seem that that reason is not now cogent when the United States themselves have control of the government in all its details—when, as we understand, officers of the United States Marine Corps are the government. In any event we respectfully submit, as hereinbefore stated, that the Act of 1900, rather than the Treaty, is controlling, and request your good offices in having Vallejo arrested and extradited.

The Secretary of State replied:

The Department does not concur in your view that the Act of Congress cited controls in preference to the Treaty in the matter of the return to the Dominican Republic of fugitives from that country found in the territory of the United States. The Treaty of Extradition of June 19, 1909, between the United States and

the Dominican Republic was concluded for the purpose of arranging for the reciprocal surrender by the authorities of either country of fugitives from the justice of the other. The position of the Government of the United States with respect to the Dominican Republic is not regarded as having suspended the treaties between the two countries. The military authorities of the United States, in so far as they are functioning in the Dominican Republic, conduct the administration of the country for the Government of the Dominican Republic, and the Government of the United States maintains a Legation at the capital of the Dominican Republic and the Government of the Dominican Republic maintains a Legation in the United States. When the Act of June 6, 1900, amending Section 5270 of the Revised Statutes of the United States, became a law, the Government of Spain, by the Treaty of Peace of December 10, 1898, between the United States and Spain, had relinquished sovereignty in Cuba and no recognized foreign government existed there. The affairs of the island were administered by an organization established by the Military Governor.

It may be observed in conclusion that the Act of June 6, 1900, provides that the proceedings under the Act shall be had before a judge of the courts of the United States only, and that the case is not before the Department of State for action until the judge submits to the Department a certificate that he deems the evidence sufficient to sustain the charges made against the accused, together with a copy of the record of proceedings had before him. Inasmuch as the case in which you are interested has not been certified to the Department in the manner required by law, no action would seem to be required by the Department at present.

Zabriskie, Sage, Gray and Todd to Secretary Hughes, May 6, 1922, and Under Secretary Phillips to Zabriskie, Sage, Gray and Todd, May 25, 1922, MS Department of State, file 211c 39V24/2.

During the occupation in 1914 of Veracruz, Mexico, Captain F. E. Bamford of the United States Army stationed there telegraphed to the Cuban Government, requesting the arrest with a view to extradition of Antonio Blanco, accused of robbery in Veracruz. The American Minister to Cuba reported on May 19 that the Cuban Foreign Office objected to the irregularity of the request and that he had therefore asked that the fugitive be detained. The Minister requested that extradition papers be forwarded. The Secretary of State replied:

... Vera Cruz not being within territorial jurisdiction of United States, Department does not consider that under extradition treaty with Cuba United States Government is entitled to ask extradition of fugitive charged with crime in Vera Cruz.

You will therefore withdraw request for detention of Blanco, which request Department is of opinion you should not have made without instructions from it.

You may say unofficially to Foreign Office that you would be glad if Cuban authorities could see their way clear to make informal surrender of fugitive to military authorities Vera Cruz, adding, however, that United States Government could not under its laws grant reciprocal favor.

The Minister to Cuba (Gonzales) to the Secretary of State (Bryan), May 19, 1914, and Mr Bryan to Mr Gonzales, May 20, 1914, MS. Department of State, file 237 12B59.

LEASED TERRITORY

§310

Guantanamo A question arose in 1911 concerning the proper construction of the terms of the lease signed on July 2, 1903 by the United States and Cuba, under which the United States obtained the right to establish and maintain a naval station at Guantanamo. Article 4 of the lease provides:

Fugitives from justice charged with crimes or misdemeanors amenable to Cuban law, taking refuge within said areas, shall be delivered up by the United States authorities on demand by duly authorized Cuban authorities.

On the other hand the Republic of Cuba agrees that fugitives from justice charged with crimes or misdemeanors amenable to United States law, committed within said areas, taking refuge in Cuban territory, shall on demand, be delivered up to duly authorized United States authorities.

A private in the United States Marine Corps attached to a naval vessel temporarily in the harbor of Guantanamo was charged with theft committed outside of the limits of the naval reservation. He escaped from the local authorities and took refuge within the naval reservation. A request for surrender was made by the proper Cuban authorities. The Secretary of State, in a letter dated May 19, 1911 to the Secretary of the Navy, stated that—

this Department shares the view of the Acting Secretary of the Navy that under the provisions of Article IV of the Lease between the United States and Cuba, signed July 2, 1903, under which this Government secured the right to establish and maintain a naval station at Guantanamo, Cuba, a private in the United States Marine Corps attached to a naval vessel temporarily in the harbor at Guantanamo, charged with theft in Cuban territory outside the naval reservation, who has escaped and taken refuge within the reservation, is subject to surrender to the Cuban authorities for trial for the alleged offence, upon proper identification and the submission of evidence sufficient to establish a *prima facie* case of guilt.

1 Treaties, etc. (Malloy, 1910) 360, 361; the Secretary of State (Knox) to the Secretary of the Navy (Meyer), May 19, 1911, MS. Department of State, file 211.37/1.

The Postmaster General informed the Secretary of State in 1921 that Harry R. Wilson, Navy mail clerk, and Younger W. Shelton, Navy mail orderly, deserted from the U.S.S. *Black Hawk* at Guantanamo, Cuba, after embezzling official funds in excess of \$10,000 and that the two men were reported to be in the interior of Cuba. The Postmaster General added that the facts had been submitted to the Department of Justice and that a reply had been received stating that the extradition treaty between the United States and Cuba could not be applied as there was no jurisdiction in any District Court in the United States to entertain a complaint against the men prior to their being apprehended and brought to the United States. The Secretary of State was requested to furnish two Post Office inspectors with letters of introduction to the American diplomatic representatives in Cuba to assure their cooperation with the Post Office inspectors in their efforts to apprehend the accused men. These letters were furnished. Article IV of the lease to the United States by Cuba of land and water for naval or coaling stations in Guantanamo and Bahia Honda, signed on July 2, 1903 (1 Treaties, etc. [Malloy, 1910] 360, 361), providing for extradition, was not referred to by either Department.

The Postmaster General (Hays) to the Secretary of State (Hughes), June 13, 1921, MS. Department of State, file 237.11W69/-.

The United States and Great Britain concluded, on September 2, 1940, an arrangement under which the United States acquired the right to lease naval and air bases in certain British possessions. A further agreement for the use and occupation of these bases was concluded on March 27, 1941. Article IV of the later agreement reads:

(1) In any case in which

(A) A member of the United States forces, a national of the United States or a person who is not a British subject shall be charged with having committed, either within or without the leased areas, an offence of a military nature, punishable under the law of the United States, including, but not restricted to, treason, an offence relating to sabotage or espionage, or any other offence relating to the security and protection of United States naval and air bases, establishments, equipment or other property or to operations of the Government of the United States in the territory; or

(B) A British subject shall be charged with having committed any such offence within a leased area and shall be apprehended therein; or

(C) A person other than a British subject shall be charged with having committed an offence of any other nature within a leased area, the United States shall have the absolute right in the first instance to assume and exercise jurisdiction with respect to such offence.

(2) If the United States shall elect not to assume and exercise such jurisdiction the United States authorities shall, where such offence is punishable in virtue of legislation enacted pursuant to Article V or otherwise under the law of the territory, so inform the Government of the territory and shall, if it shall be agreed between the Government of the Territory and the United States authorities that the alleged offender should be brought to trial, surrender him to the appropriate authority in the territory for that purpose.

(3) If a British subject shall be charged with having committed within a leased area an offence of the nature described in paragraph (1) (A) of this article, and shall not be apprehended therein, he shall, if in the territory outside the leased areas, be brought to trial before the courts of the territory; or, if the offence is not punishable under the law of the territory, he shall, on the request of the United States authorities, be apprehended and surrendered to the United States authorities and the United States shall have the right to exercise jurisdiction with respect to the alleged offence.

Article VIII of the agreement provides:

Where a person charged with an offence which falls to be dealt with by the courts of the territory is in a leased area, or a person charged with an offence which falls under Article IV to be dealt with by courts of the United States is in the territory but outside the leased areas, such person shall be surrendered to the Government of the Territory or to the United States authorities, as the case may be, in accordance with special arrangements made between that Government and those authorities.

Ex. Agree. Ser. 181; Department of State, III *Bulletin*, no. 63, pp. 199-200 (Sept. 7, 1940); *ibid*, IV *Bulletin*, no. 92, pp. 387, 388-389 (Mar. 29, 1941).

A question arose in 1923 between the Government of the United States and the Government of Panama as to the proper Government to consider a request by the Government of Chile for the extradition of an alleged fugitive in the Canal Zone, involving specifically article XVI of the treaty of November 18, 1903 between the United States and Panama (2 Treaties, etc. [Malloy, 1910] 1349, 1354; 33 Stat. 2234, 2238). After the Secretary of State had declined to surrender to Panama two alleged fugitives from the justice of Chile, the Minister of Panama requested the conclusion of a new agreement which would provide for surrender in such cases. The Secretary of State expressed the view that such an agreement was not necessary. The Panamanian Minister later, in requesting that the matter be reconsidered, said that—

Panama
Canal
Zone

the Department of State asserts that Article XVI of the Varilla-Hay Treaty places both contracting parties on the same footing with regard to the extradition or reciprocal surrender of criminals; and resting on that assertion, denies that the Government of the Zone is under any obligation to surrender to the Government of Panama persons that may have committed offenses in other countries. It is also remarked that in support of its refusal the Department of State finally cites Article III of the Treaty.

As to the first point Your Excellency will note that Article XVI, in its reference to the criminals, that the Government of the Zone must surrender to that of Panama, says expressly that they are those who shall have offended *without* the Canal Zone and those that the Republic of Panama shall surrender to the authorities of the Zone are those who shall have offended *within* the said Zone. The surrender conditions as is seen are absolutely distinct and not the same as the State Department asserts as a basis for its refusal; and this interpretation of Panama's rests not only on the letter of the Treaty which is unmistakable but on its spirit which cannot be that of converting the Canal Zone into an independent colony capable of maintaining international relations with the outside world.

As to the second point it is proper to say that Article III of the Treaty cannot do away with the other stipulations contained therein and its scope is necessarily restricted by the very object of the treaty proclaimed in its preamble and in many of its provisions.

On the other hand since extradition is governed by a special article of the Treaty, Article III cannot apply to this question because under the principles that govern the interpretation of laws and treaty the particular prevails over the general and that which specifically denies something prevails over what is for it in a general way.

Article XVI of the Treaty is clear and is not open to question. Furthermore the extradition treaties with the United States are not applicable to the Canal Zone because the very text of Article 12 of the Panama Canal Act forbids it. If the zone were an integral part of the territory of the United States there would have been no necessity for Panama and the Zone to issue their respective orders governing the extradition of fugitives between the two jurisdictions, but the treaty of extradition concluded by Panama and the United States and signed as early as 1904 by the Plenipotentiaries Arias and Russell would have obtained.

. . . I said in my note [June 25, 1923] above mentioned that in the special matter of extradition of criminals, Article III of the Treaty of 1903 does not apply because the Hay-Herrán Treaty concluded with Colombia did not grant to the United States in the Canal Zone the jurisdictional powers granted by the aforesaid Article III, but established a mixed jurisdiction in the zone, and notwithstanding this, the Hay-Herrán Treaty contained with regard to extradition a provision identical with that in Article XVI of the Treaty concluded with Panama. (See No. IV, Article XIII, *Hay-Herrán Treaty, Diplomatic History of the Panama*

Canal, Sen. Doc. No. 474). The question of extradition being thus settled between Panama and the United States through a provision identical with that which settled the same question between the United States and Colombia, it is obvious that the question was left to the political sovereignty of Panama in the same way as it had been previously left to the political sovereignty of Colombia.

[Translation.]

The Secretary of State, in replying on October 13, 1923, stated:

It is true, as you state, that this article [article XVI] contemplates an agreement between the two governments for the delivery to Panama of persons who shall have offended without the Canal Zone and the delivery to the authorities of the United States of persons who shall have offended within the zone. However, this proposed agreement further contemplates, with respect to offenders within the zone, their "pursuit, capture, imprisonment, detention and delivery without said zone". In other words, assuming that your construction of the provisions of this article is correct, an agreement is contemplated whereby Panama shall pursue, capture, imprison, and detain wheresoever they may be throughout the world, persons charged with the commission of offenses within the Canal Zone. To state such a proposition would seem to be a sufficient answer to it.

Referring to your statement on this point, it may be said that there is, of course, no thought of "converting the Canal Zone into an independent colony capable of maintaining international relations with the outside world". Foreign governments seeking the extradition of fugitives from justice who have been found within the Canal Zone will necessarily apply to the Government of the United States for the extradition of such fugitives and their surrender will be granted, if at all, by the United States. Furthermore, the arrangement which has been made with Panama pursuant to the provisions of Article XVI of the treaty of 1903 was so made on the part of the United States by the President acting through the Governor of the Canal Zone and by virtue of authority invested in him by the Congress, and the executive order providing for such an arrangement was formally embodied in the laws of the United States, together with other executive orders relating to the Canal Zone by the Panama Canal Act of 1912.

With respect to your statement that the extradition treaties of the United States are not applicable to the Canal Zone "because the very text of Article 12 of the Panama Canal Act forbids it", I beg to say that this Article provides specifically that all treaties relating to extradition in force in the United States "to the extent that they may not be in conflict with or superseded by any special treaty entered into between the United States and the Republic of Panama with respect to the Canal Zone . . . shall extend to and be considered in force in the Canal Zone".

You further say that if the zone were an integral part of the territory of the United States there would have been no neces-

sity for a special arrangement governing the extradition of fugitives between the zone and the Republic of Panama "but the treaty of extradition concluded by Panama and the United States . . . would have obtained". I beg to remind you in this connection, that the arrangement contemplated by Article XVI of the treaty of 1903 and consummated in 1906 relates to the extradition of persons charged with the commission of "crimes, felonies or misdemeanors". The Extradition Treaty of 1904 does not extend to persons charged with misdemeanors, and in view of the geographical situation of the Canal Zone with respect to the Republic of Panama and vice versa it is, of course, highly desirable that persons charged with the commission of misdemeanors should not be afforded an opportunity of seeking the easy refuge which would be theirs, were not an arrangement in effect for their delivery to the jurisdiction where their offenses were committed. Moreover, that geographical situation renders it desirable that delivery of fugitives from justice should be consummated without compliance with all of the formalities which are contemplated by the Extradition Treaty of 1904 and it was undoubtedly with these considerations in mind that the two governments provided in the treaty of 1903 for the making of a special agreement for extradition to and from the Canal Zone and the Republic of Panama.

You refer to the supposed identity of the provisions as to an extradition arrangement contained in Article XVI of the Treaty of 1903 between the United States and Panama and in Article XIII of the Hay-Herrán Treaty signed between the United States and Colombia, and you state that in view of this and since the Hay-Herrán Treaty did not grant to the United States the jurisdictional powers in the Canal Zone granted by the Treaty of 1903 between the United States and Panama, but established a mixed jurisdiction with respect to criminal cases "it is obvious that the question [of extradition] was left to the political sovereignty of Panama in the same way as it had been previously left to the political sovereignty of Colombia".

Inasmuch as the proposed Hay-Herrán Treaty never came into force, a discussion of its provisions is purely academic. However, it may be pointed out that these respective provisions relative to extradition to which you refer are not identical as you suggest. The proposed Hay-Herrán Treaty provided for the making of an agreement generally, for "the pursuit, capture, imprisonment, detention and delivery within said zone of persons charged with the commitment of crimes, felonies or misdemeanors without said zone" and for the "pursuit, capture, imprisonment, detention and delivery without said zone of persons charged with the commitment of crimes, felonies, and misdemeanors within said zone". On the other hand, the treaty between the United States and Panama contains the additional and limiting provisions that "delivery" within the zone shall be made "to the authorities of the Republic of Panama" and without the zone "to the authorities of the United States".

However, I am of the opinion that even without these additional and limiting provisions, the words "without said zone", contained in the quoted provisions of Article XIII of the proposed Hay-Herrán Treaty, must be taken to refer to the territory of the Republic of Colombia outside of the Canal Zone, and in this connection I would point out that it would be most extraordinary for the United States and Colombia to agree to make an arrangement regarding the *pursuit, capture, detention, imprisonment and delivery* throughout the world generally of fugitive criminals.

The Panamanian Minister (Alfaro) to the Secretary of State (Hughes), Sept. 6, 1923, and Mr. Hughes to Señor Alfaro, Oct. 13, 1923, MS. Department of State, file 211f.19/9.

In commenting, in 1940, upon a request of the War Department for the views of the Department of State concerning the application for the extradition from the Canal Zone to Panama of persons charged with political offenses, it was said:

"Extradition to Panama from the Canal Zone is provided for in an order of the Governor of the Canal Zone dated September 19, 1906, which order was issued by authority of the President and in apparent pursuance of article XVI of the treaty of 1903 between the United States and Panama. A reciprocal decree was issued by the President of Panama September 22, 1906. This order and this decree appear to constitute the reduction to writing of an agreement between the two jurisdictions, and the order of the Governor of the Canal Zone was embodied in the act of Congress approved July 5, 1932 and appears as sections 881 to 892 of Title 6 of the Canal Zone Code approved June 19, 1934. The provisions of the order as incorporated in the Code and as pertinent to the present discussion are found in section 881 of the Code as follows:

"All persons who have been condemned, prosecuted or accused before the courts of the Republic of Panama as authors or accomplices of crimes, transgressions or offenses against the laws of said Republic, who seek refuge in the Canal Zone, shall be, upon apprehension, taken into custody by the authorities of the Canal Zone and delivered to the authorities of the Republic of Panama, upon the demand of the Government of that Republic and compliance with the procedure hereinafter prescribed."

"The order contains no provision for the exception of political offenders from the general obligation to surrender, although such a provision is found in practically all of the extradition treaties of the United States.

"With reference to provisions contained in extradition treaties of the United States excepting political offenders from the obligation to surrender it may be pointed out that in most of the recent extradition treaties of the United States an exception is made to this exception permitting the extradition of persons committing or attempting to commit murder, or assassination upon the person of a sovereign or head of a state or any of his family. Moreover, the extradition treaty of 1930 between the United States and Germany provides expressly that—

"A willful crime against human life except in battle or in open combat, shall in no case be deemed a crime of a political character, or an act connected with crimes or offenses of such a character."

"In view of the foregoing it may be concluded that while the modern practice of the states of the world is to exempt, with some limitations, political offenders from extradition, the Harvard Research is correct in its statement that—

"There is no generally recognized rule of international law holding that extradition for a political offense is never permissible."

"So far as concerns expressions of international law writers indicating that political offenders will not be extradited even though there is no conventional inhibition against such extradition, it appears that this conclusion is based upon the theory that the enumeration of ordinary offenses in an extradition treaty implies the exclusion of political offenses. However, in the case under consideration there is no enumeration of ordinary offenses and therefore this ground for holding that political offenders are excluded even though such exclusion is not set forth would seem to fall to the ground in this case. Moreover, the enumeration of ordinary offenses implies also the exclusion of any ordinary offenses not so enumerated as well as of political offenses.

"It is pertinent to point out, as bearing upon the situation between the Canal Zone and the Republic of Panama, that as above set forth the Harvard Research indicates that it may well be that some states

'because of close association or because of the close similarity of their political institutions, would find the extradition of political offenders desirable.'

In general it would seem undesirable from the point of view of the United States to regard the Canal Zone as a place of refuge for persons endeavoring to promote revolutionary or subversive acts in the Republic of Panama. In any event the United States has agreed with Panama to surrender

'all persons who have been condemned, prosecuted, or accused before the courts of the Republic of Panama as authors or accomplices of crimes, transgressions or offenses against the laws of said Republic, who seek refuge in the Canal Zone.'

And the two jurisdictions have not embodied in their agreement any exception for political offenders. Moreover, the provisions of the agreement have been embodied in the statute law of the United States.

"It is difficult to escape the conclusion that the Canal Zone authorities are obligated to surrender to the Republic of Panama the Panamanian citizens whose extradition is now being sought and who, it appears, have appealed to the United States Circuit Court of Appeals at New Orleans from decisions of the District Court in the Canal Zone denying the issuance of writs of *habeas corpus* in their cases.

"Finally, it is submitted that so far as concerns Executive action in the premises, the Governor of the Canal Zone is the final authority and that the Department of State is without control of the matter. Undoubtedly the Governor will defer final action pending the outcome of action in the courts."

Memorandum of Joseph R. Baker, Assistant to the Legal Adviser of the Department of State, May 31, 1940, MS. Department of State, file 211F.19/50.

DEPORTATION

§311

The immigration laws of the United States provide for the exclusion or deportation of aliens who have been convicted of or who admit the commission of certain classes of crimes in foreign countries. These laws are separate and distinct from the laws and treaties relating to extradition. They are not enacted for the benefit of foreign governments or for the purpose of bringing fugitives to justice; rather, they are for the protection of the United States. However, requests are sometimes made by governments for the deportation by other governments of fugitives from justice, and occasionally steps are taken—especially in the absence of an extradition treaty—to deport such persons.

The *Chargé d'Affaires ad interim* of Mexico by a note dated October 21, 1906, addressed to the Secretary of State, requested the provisional arrest and detention of five persons, including Antonio Villareal, charged in Mexico with the crimes of attempt to commit murder, robbery, and damage to the property of others, comprising an attempted destruction of railway tracks on Mexican territory. The persons named were supposed to be in St. Louis, Missouri. The Department of State addressed a letter to the Attorney General with a view to effecting the provisional arrest and detention of the accused.

Villareal was finally apprehended in El Paso. Subsequently the Mexican *Chargé d'Affaires* took up with the Department of Commerce and Labor the question of the deportation of Villareal on the ground that he had been convicted of a crime involving moral turpitude prior to entering the United States. The Department of Commerce and Labor suggested to the *Chargé d'Affaires* that he should forward to the Immigration Inspector at El Paso the proof to substantiate the charge against Villareal and that he should send it through the Department of State.

Later, the Acting Attorney General informed the Department that he had been informed by the Mexican Embassy, through its Secretary, that the request theretofore made for the extradition of Villareal had been withdrawn. It was added that the Secretary of the Mexican Embassy had stated that there was also pending against Villareal a charge of violating the neutrality laws of the United States. The Embassy informally requested that proceedings for violation of the neutrality laws be dropped so that Villareal might be deported at once. The Acting Attorney General stated that the Department of Justice was disposed to grant the request unless some good reason existed why such action should not be taken. It was also pointed out that the Secretary of Commerce and Labor, in a letter dated Novem-

ber 10, 1906, had suggested that the Mexican Government desired to apprehend Villareal "because of the fact that he was an avowed revolutionist and enemy of the said government". Finally the Acting Attorney General stated that this fact would not seem to be sufficient to prevent the deportation of Villareal for a violation of the immigration laws. In replying on November 14, 1906 to the Acting Attorney General the Department of State said that—

this Department has had no official information that proceedings against Villareal are pending or contemplated for violation of our neutrality laws, but, if such is the case, it can see no objection to their suspension in order to allow the authorities of the Department of Commerce and Labor to prosecute him under the immigration statutes, with a view to his deportation, if a proper case is established against him.

The Mexican Chargé d'Affaires (Dávalos) to the Secretary of State (Root), no. 219, Oct. 21, 1906, and Mr. Root to the Attorney General (Moody), Oct. 23, 1906, MS. Department of State, file 1741; the Acting Secretary of Commerce and Labor (Garfield) to the Acting Secretary of State (Bacon), Nov. 6, 1906, *ibid.* 1741/12-13; Acting Attorney General Hoyt to Mr. Root, Nov. 13, 1906, and Mr. Bacon to Mr. Hoyt, Nov. 14, 1906, *ibid.* /15.

In 1908 the Italian Ambassador at Washington asked the Secretary of State to furnish him with a certificate showing that a request had been made for the extradition of Arturo Ronchi, charged in Italy with embezzlement and forgery. While the proceedings were pending the Ambassador again wrote to the Secretary of State, saying:

I beg Your Excellency kindly to furnish me with another Federal certificate with which to institute fresh proceedings against Arturo Ronchi who is last referred to in your valued note no. 667 dated August 14 last. Ronchi's case is now under examination before the "Board of Special Inquiry" of New York and there is occasion to believe that the said Board may eventually accept the theory advanced by Ronchi's counsel and order his release.

The Board to which the Italian Ambassador referred was one set up by the Bureau of Immigration. It ordered the deportation of the accused even while the extradition proceedings were pending.

The Italian Ambassador (Mayor) to the Secretary of State (Root), May 31 and Oct 20, 1908, MS. Department of State, file 13841, 13841/6.

The Minister of Greece wrote to the Secretary of State in 1908 as follows:

One of the correspondents in Greece of the National Bank of Greece, named Constantin Papadopoulos, after embezzling from the Bank 45,000 francs and other sums of money belonging to various persons shipped for New York on the *Laura* of the Austro

American line—which sailed from Patras a few days ago—under the assumed name of Demetrius Oeconomon. The American Consulate General at Athens has already notified by cable the Chief of Police at New York.

I should be very thankful if you would be so obliging as to communicate the foregoing to the Department of Commerce and Labor so that the man may be identified and, in application of law, sent back to the port of embarkation on the same vessel.

A copy of the Minister's note was transmitted to the Secretary of Commerce and Labor, who, in a letter dated September 22, stated:

The Greek Minister called upon me today . . . and I . . . informed him that he must bear in mind that our immigration laws are not made for the benefit of foreign governments but only for our own protection, and that he doubtless understood no foreign government had a right to ask that the immigration laws be invoked for its benefit. I then asked him whether his Government had an extradition treaty with our country, and he stated no, but they were negotiating one now and he hoped and expected that his country would agree to such a treaty.

I report these matters to you because I can see great danger, which I have pointed out in previous communications, in permitting foreign governments to avail themselves of our immigration laws to obtain, in a more expeditious way, what should be effected through extradition treaties.

Of course we have the power, under the laws, to exclude persons who have been guilty of crimes involving moral turpitude, and as it seems to be your wish that this Department take such action as it is empowered to under the law, I will immediately give instructions for the detention and examination of the person named upon his arrival, and thereupon such action will be taken by this Department as the facts will warrant.

In a subsequent letter the Acting Secretary of Commerce and Labor stated further:

A report just received from the Commissioner at Ellis Island shows that the alien mentioned arrived on October 7th and was rejected by a board of special inquiry and deported to Greece.

The Greek Minister (Coromilas) to the Secretary of State (Root), Sept. 22, 1908, MS. Department of State, file 15637/2; the Secretary of Commerce and Labor (Straus) to Mr. Root, Sept. 22, 1908, *ibid.* /3; the Acting Secretary of Commerce and Labor (Earl) to Mr. Root, Oct. 19, 1908, *ibid.* /6.

Werner Horn (sometimes spelled Vernil Horne), whose extradition had been requested by the Government of Canada, was convicted and sentenced in Massachusetts on a charge preferred by the Federal authorities before any action could be taken in the matter of his extradition. On October 17, 1917 the British Ambassador inquired whether the authorities of the United States would be willing, before the expiration of the sentence of Horn and without formality of

extradition, to deliver the accused to the Canadian police at the New Brunswick border to be tried there for the more serious offense charged against him under the laws of Canada. The matter was referred to the Attorney General, who replied that he did not think that extradition proceedings would have to be resorted to since, under the President's proclamation of April 17, 1917 issued under the authority of section 4067 of the Revised Statutes, the President had ample authority to declare Horn an alien enemy at large to the danger of the peace and safety of the United States and, as incident to that declaration, he had the power to order him removed to Canada.

In a subsequent letter the Department of Justice said further:

This Department has the honor to advise you, moreover, that after further consideration of this case it deems its authority to deliver Mr. Horn to the Canadian authorities, without formal extradition proceedings, to be sufficiently doubtful to induce it to prefer to hold Mr. Horn as an interned alien enemy until the termination of the war, leaving to the Canadian authorities at that time to carry through the ordinary extradition proceedings in case they so desire.

The British Ambassador (Spring Rice) to the Counselor for the Department of State (Polk), Oct. 17, 1917, MS. Department of State, file 211.42 H78/11; Attorney General Gregory to Secretary Lansing, Oct. 31, 1917, *ibid.* /12; the Special Assistant to the Attorney General for War Work to Mr. Lansing, Nov. 6, 1918, *ibid.* /14.

TREATY PROVISIONS

OPERATION AND EFFECT

§312

Treaties of extradition are usually bilateral in form and reciprocal in their undertakings. However, a number of multilateral treaties or conventions on the subject have been concluded. On December 26, 1933 a convention between the United States and other American republics was signed at Montevideo. The most outstanding difference between this convention and the more-or-less standard type of bilateral agreement is the absence of an enumeration of offenses for which extradition will be granted. Article 1, which takes the place of the usual enumeration, provides:

Each one of the signatory States in harmony with the stipulations of the present Convention assumes the obligation of surrendering to any one of the States which may make the requisition, the persons who may be in their territory and who are accused or under sentence. This right shall be claimed only under the following circumstances:

a) That the demanding State have the jurisdiction to try and to punish the delinquency which is attributed to the individual whom it desires to extradite.

b) That the act for which extradition is sought constitutes a crime and is punishable under the laws of the demanding and surrendering States with a minimum penalty of imprisonment for one year.

4 Treaties, etc. (Trenwith, 1938) 4800, 4801; 49 Stat. 3111, 3113. For other multilateral agreements, see Research in International Law, *Extradition* (Harvard Law School, 1935), 29 A.J.I.L. Supp. (1935) 274 *et seq.*

The surrender of a person pursuant to the provisions of a treaty of extradition in force between the United States and the demanding foreign country has been held to be in accord with the provision of the fifth amendment to the Constitution that no person shall be deprived of life, liberty, or property, without due process of law.

Ex parte Charlton, 185 Fed. 880, 885 (C.C., D.N.J., 1911). Although this case went to the Supreme Court, the foregoing was not referred to in its opinion.

Michael Schorer was arrested in the United States in 1911 at the instance of the German Government with a view to his extradition under the convention of September 12, 1853 between the United States and Bavaria. 10 Stat. 1022; 1 Treaties, etc. (Malloy, 1910) 58. He was accorded a hearing and committed for the action of the Secretary of State. Later he was released through *habeas-corpus* proceedings on the ground that the committing magistrate had not been authorized to act as an extradition magistrate. Thereafter he was taken into custody with a view to his deportation. He was again released, and later he was rearrested with a view to his extradition but was once more released, this time on two grounds, namely, that the record failed to disclose an Executive mandate of requisition and that it failed to show a sufficient *prima-facie* case against the accused under the law of the asylum state. A third arrest with a view to his extradition was made on March 16, 1912. The accused moved for a dismissal of the proceedings on the ground that he had been discharged on *habeas corpus* on the identical charge and on the further ground that he was not subject to rearrest on the mere allegation in the complaint that the demanding government had made representations that it would forward new evidence of guilt. The motion was denied. The accused thereupon petitioned for a writ of *habeas corpus*. The District Court of the United States for the Eastern District of Wisconsin said:

On behalf of the petitioner it is claimed broadly that the present detention cannot be justified upon mere representations of forthcoming new or different evidence; that until such evidence is actually produced, the discharge from former arrest should bind

both the German and the United States governments, though perhaps not strictly with the effect of a former acquittal. . . .

There does not seem to be much doubt as to the legal principles governing this situation. The rule laid down in *Re MacDonnell*, 11 Blatchf. 100, Fed. Cas. No. 8771, and which has been followed and applied in subsequent cases, clearly recognizes the right to institute second proceedings where the alleged fugitive has been once examined and discharged. . . .

Indeed, it was conceded upon this hearing that the power on the part of the government, and therefore its duty, to institute second proceedings, is not open to question. The question is therefore presented: Is there anything in the record before us showing any fact or circumstance, or any course of procedure by reason of which it can be successfully contended that such power has been lost, or that the government must, out of respect to the rights of the accused, be held to be absolved from the duty of exercising it? I think the question must be answered in the negative. . . .

. . . It may be noted that upon the former hearing the German government presented a voluminous record of testimony taken abroad, which its representatives doubtless conceived made out a case for extradition. Such record certainly disclosed a diligent effort to present the facts and circumstances attending many different transactions. The court here was of the opinion that the evidence fell short of making out a *prima facie* case. The subsequent arrest and reexamination being then instituted, the government here and the officials charged with the duty of carrying out the provisions of the treaty and the statutes, not only had the right, but are in duty bound, to accept in good faith for a reasonable time the representations made by the highest consular officials of the foreign government respecting new and forthcoming evidence. . . . To my mind there is nothing in the record returned by the commissioner which casts any doubt upon the good faith of the proceedings.

Ex parte Schorer, 195 Fed. 334, 337-339 (D.C., E.D. Wis., 1912).

The Attorney General asked on July 16, 1909 that, if practicable, the Secretary of State request the Dominican Government for the arrest and detention of José Antonio Gaudier, charged in Puerto Rico with embezzlement. The Acting Secretary replied that—

Retroactive
effect

there being no extradition treaty effective between the Government of the United States and the Government of the Dominican Republic, it would be necessary, should this Government now make a request for the surrender of Gaudier, that it ask such surrender as a matter of grace, it being specifically pointed out in such request that it would be impossible for the United States to reciprocate such a favor should the Government of San Domingo request it. While other Governments have at times surrendered fugitives from our justice upon a request made in such terms, they usually decline so to do because of our inability to

grant a reciprocal favor. The Department will, however, make the request, should you so desire.

It should be noted in this connection that an extradition treaty between this Government and San Domingo has been signed and is now before our Senate for ratification. As soon as this treaty is proclaimed, it would in all probability be possible to secure the return of Gaudier as a matter of treaty right. The Department is of the opinion that it would be wisest to postpone any request for the surrender of the fugitive until after the treaty goes into effect.

However, the American Minister Resident was later instructed to bring the matter informally to the attention of the Dominican officials, with a view to ascertaining whether they would look with favor on a request for surrender as an act of grace, and to make a formal request for extradition should it appear that the Dominican Government would favorably entertain the request. A formal requisition was made, and the accused was surrendered.

Attorney General Wickersham to Secretary Knox, July 16, 1909, and Acting Secretary Adeë to Mr. Wickersham, July 23, 1909, MS Department of State, file 20594; Acting Attorney General Ellis to Mr. Knox, Sept 13, 1909, and Mr. Adeë to the Minister Resident (McCreery), Sept 23, 1909, *ibid.* /3-4; the Chargé d'Affaires at Santo Domingo (Endicott) to Mr. Knox, Oct. 26, 1909, *ibid.* /14. That extradition treaties are retroactive in effect, see the Minister of Honduras (Luis Lazo A) to Mr. Knox, Feb 21, 1910, *ibid.* 211.15/21; the Acting Legal Adviser (Baker) to the District Attorney (Bradford), Aug. 21, 1939, *ibid.* 211.90d/16; 1 Moore, *Treatise on Extradition and Interstate Rendition* (1891) 99.

Crimes subsequently enumerated

The supplementary extradition convention concluded on April 12, 1905 between the United States and Great Britain (34 Stat. 2903; 1 Treaties, etc. [Malloy, 1910] 798, 799) added to the list of extraditable crimes "offenses, if made criminal by the laws of both countries, against bankruptcy law". An alleged fugitive from the justice of Scotland was held to be extraditable thereunder notwithstanding that at the time the crime was committed the act was not an offense under the laws of the United States. The United States Circuit Court of Appeals for the Second Circuit said:

For the purposes of this appeal, relator was, when demand made, guilty of such an offense against bankruptcy law. That he did not at any time commit an offense against the bankruptcy statute of the United States is obviously immaterial.

Thus the point stated becomes more specifically this: Oppenheim cannot be extradited because, in 1924, he was not guilty of an offense *then* "made criminal by the laws of both countries."

The treaties do not contain in terms any such restriction, nor do they in terms refer the time of criminality "by the laws of both countries" to the time of demand; the matter is one of judicial or professional construction.

We think the settled construction is against relator.

United States ex rel. Oppenheim v. Hecht, U.S. Marshall, 16 F. (2d) 955, 958 (C.C.A. 2d, 1927).

The Secretary of State, in replying in 1924 to a request for the provisional arrest and detention of Fred J. Owens, with a view to his extradition from Honduras, said: Revolution

In view of the fact that due to revolutionary disturbances there is now no government in Honduras which is recognized by the Government of the United States I regret to be obliged to inform you that the Department is not in a position to comply with your request at the present time.

Secretary Hughes to Attorney General Daugherty, Mar. 14, 1924, MS. Department of State, file 213.110w2/-.

The Department of State does not carry on extradition proceedings with regimes in foreign countries which have not been recognized. Unrecognized governments

Secretary Kellogg to the Legation in Panamá, telegram of May 26, 1926, MS. Department of State, file 211f 178A5/-.

The Mexican Ambassador requested, on December 16, 1919, the extradition from the United States of Ramon A. Zamora. Subsequently there came into power in Mexico a regime which had not been recognized by the United States at the time the Secretary of State received from the United States commissioner at Houston, Texas, the record of the extradition proceedings. In recommending to the Secretary of State the issuance of a warrant of surrender, the Solicitor for the Department of State, in a memorandum dated July 22, 1920, said that—

it is established by sound authority that, in international practice, the surrender of criminals to *de facto* authorities does not indicate expressly or by implication political recognition. The recovery of fugitive criminals merely affects the practical course of the administration of justice. This theory has been acted upon by the Department in the past.

. . . If it is deemed proper to transmit a warrant, . . . an informal communication such as one in the shape of a memorandum might be sent enclosing the warrant. Whether such action shall be taken is a question of policy.

The United States marshal at Houston, Texas, was later informed:

It has been decided that extradition proceedings with Mexico shall be suspended for the present and you are therefore directed to discharge Zamora from custody.

The Mexican Ambassador (Bonillas) to the Secretary of State (Lansing), no. E-4820, Dec. 16, 1919, MS. Department of State, file 211.12Z1/orig.; the Solicitor for the Department of State (Nielsen) to the Secretary of State (Colby), July 22, 1920, *ibid.* /6; Mr. Colby to the United States marshal at Houston, Sept. 4, 1920, *ibid.* /7.

Effect
of war

The Consul in charge of the Cologne office of the American Commission to Germany informed the Department of State in 1921 of the efforts of the German authorities to apprehend Vincent Special, charged with theft in Coblenz. The Consul, after stating that the German court would probably attempt to extradite the accused, added that Special was understood to be on his way to the United States and that the correspondence regarding him was being transmitted to the Department of State in order that it might be referred to the Department of Justice for investigation, if considered expedient. The Department wrote the American Commissioner in Berlin as follows:

You are instructed to inform Mr. Sauer that since the United States is still technically in a state of war with Germany, extradition proceedings between the two countries are not now being carried on.

The Consul in charge of the Cologne office of the American Commission to Germany (Sauer) to the Secretary of State (Hughes), Mar. 30, 1921, and the Third Assistant Secretary of State (Bliss) to the American Commissioner to Germany (Dresel), May 17, 1921, MS. Department of State, file 200.11Sp3/—.

CONSTRUCTION

§313

Executive
interpre-
tation

The United States Circuit Court for New Jersey, in 1911, held that the construction of treaties of extradition is a matter for the courts and that they are not bound to accept the interpretation thereof by the executive branch of the government or by the foreign country with which the treaty was concluded.

Ex parte Charlton, 185 Fed. 880 (C.C., N.J., 1911).

In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. *Jordan v. Tashiro*, 278 U. S. 123, 127; *Geofroy v. Riggs*, 133 U. S. 258, 271; *In re Ross*, 140 U.S. 453, 475; *Tucker v. Alexandroff*, 183 U.S. 424, 437; *Asakura v. Seattle*, 265 U.S. 332. Unless these principles, consistently recognized and applied by this Court, are now to be discarded, their application here leads inescapably to the conclusion that the treaties, presently involved, on their face require the extradition of the petitioner, even though the act with

which he is charged would not be a crime if committed in Illinois.

In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to their own practical construction of it. *Nielsen v. Johnson*, 279 U.S. 47, 52; *In re Ross*, *supra*, 467; *United States v. Texas*, 162 U.S. 1, 23; *Kinkead v. United States*, 150 U.S. 483, 486; *Terrace v. Thompson*, 263 U.S. 197, 223. And in resolving doubts the construction of a treaty by the political department of the government, while not conclusive upon courts called upon to construe it, is nevertheless of weight. *Nielsen v. Johnson*, *supra*, 52; *Charlton v. Kelly*, 229 U.S. 447, 468.

Factor v. Laubheimer, U. S. Marshal, et al., 290 U.S. 276, 293-295 (1933).

It may not be doubted, however, that extradition treaties are to be liberally, not strictly, construed, and, where conflicting interpretation may be put on a treaty obligation, one narrow and restricted, another broad and liberal, the narrow one will be rejected; for the prime consideration in construing such treaties is that "the obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships, . . . should be construed more liberally than a criminal statute or the technical requirements of criminal procedure." *Factor v. Laubheimer*, 290 U.S. 298, 54 S. Ct. 191, 197, 78 L. Ed. 315; *Ex Parte Davis* (C.C.A.) 54 F. (2d) 723; *Bernstein v. Gross* (C.C.A.) 58 F. (2d) 154; *Fernandez v. Phillips*, 268 U.S. 311, 45 S. Ct. 541, 69 L. Ed. 970; *Collier v. Vaccaro*, (C.C.A.) 51 F. (2d) 17.

Liberal
construction

Villarcas et al. v. Hammond, Marshal, 74 F. (2d) 503, 505 (C.C.A. 5th, 1934).

It is a familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties.

Valentine, Police Commissioner of New York City, et al. v. United States ex rel. B. Coles Nidecker, 299 U.S. 5, 10 (1936).

Charles C. Browne was convicted in 1904, by the Circuit Court of the United States for the Southern District of New York, on a charge of conspiracy to defraud. When, in 1906, certiorari was denied by the Supreme Court of the United States, the accused fled to Canada. Extradition on this conspiracy charge was denied; and a further request for extradition was made, charging the accused, as an officer of the revenue, with admitting or aiding in admitting to entry goods, wares, or merchandise, upon payment of less than the amount of duty legally due thereon. This later request was honored. While aboard a train in the United States the marshal for the Southern District of New York took Browne from the custody of the agent appointed to receive him from Canada and lodged

him in prison on the conspiracy conviction. A writ of *habeas corpus* was obtained, the accused claiming that his imprisonment was in violation of articles III and VII of the extradition convention concluded on July 12, 1889 between the United States and Great Britain. 26 Stat. 1508, 1509, 1510; 1 Treaties, etc. (Malloy, 1910) 740, 741, 742. The Government contended that as article III provided only that no person surrendered should be triable or be tried for any crime or offense committed prior to his extradition other than the offense for which he was surrendered, and did not, like article II relating to political offenses, contain the words "or be punished", the accused was not protected by the article.

The Supreme Court of the United States held that the mere failure to use the words "or be punished" in the third article of the convention, as they were used in the second article, did not so far change and alter the manifest scope and object of that convention and of article X of the treaty, concluded on August 9, 1842 between the United States and Great Britain, as to render legal the imprisonment of the accused on a charge different from that on which extradition was granted by the Canadian Government.

Johnson v. Browne, 205 U.S. 309, 320 (1907).

In passing upon the meaning of the word "murder" as used in the English text of the extradition convention concluded on February 22, 1899 between the United States and Mexico, the United States Circuit Court for the Southern District of New York stated:

Murder

There is no force in the contention that the requisition charges petitioner, not with murder, but with homicide. Reference to the treaty, whose clauses are printed in parallel columns in English and Spanish, shows that the word "homocidio" was considered by the two governments as the equivalent to "murder", including among other crimes "asesinato", or "assassination". The proofs show that it is that variety of "homocidio" which is known as "asesinato" with which petitioner is charged.

In re Urzua, 188 Fed. 540, 542 (1911).

Larceny

The common-law definition of larceny (according to East's Pleas of the Crown) is the "wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." In its essence it consists in the wrongful or fraudulent invasion by one of another's possession of personal property with intent to convert it to his own use, and in the taking and carrying it away. . . .

This is the meaning of the word "larceny" as generally understood in this country and the meaning of that word in the

treaties. *Kelly v. Griffin*, 241 U.S. 6, 15, 36 S. Ct. 487, 60 L. Ed. 861; *Factor v. Laubenheimer*, 290 U.S. 276, 299-301, 54 S. Ct. 191, 78 L. Ed. 315.

Hatfield v. Guay, U.S. Marshal, et al., 87 F. (2d) 358, 363 (C.C.A. 1st, 1937).

EXTRADITABLE OFFENSES

IN GENERAL

§314

Section 5270 of the Revised Statutes of the United States (18 U.S.C. §651) authorizes certain judicial authorities in the United States "Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government" to issue warrants for the apprehension of persons charged "with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention". It will be seen that the only extraditable offenses provided for in the statute are those for which provision is made by treaty or convention.

The treaties and conventions between the United States and other powers contain an enumeration of the offenses for which extradition may take place. To this general rule there is an exception, namely, the multilateral convention between the United States and other American republics signed at Montevideo on December 26, 1933, which provides in article I that extradition may be claimed if the offense of which the person is accused "constitutes a crime and is punishable under the laws of the demanding and surrendering states with a minimum penalty of imprisonment for one year". 4 *Treaties, etc.* (Trenwith, 1938) 4800, 4801; 49 Stat. 3111, 3113.

The treaties of extradition between the United States and other countries provide exclusively for the return of individuals who are themselves fugitives from justice, and it is not contemplated that the treaties shall be invoked for the purpose merely of securing the testimony of a witness. Should they be so invoked, the foreign government would have good cause to complain that extradition process was being employed for purposes quite foreign to its intent.

Return of
witnesses

The proceedings of the Sheriff of Maricopa County in the present case, therefore, would appear to be unwarranted, and the Department would be glad if you would advise him to this effect.

The Acting Secretary of State (Adee) to the Governor of Arizona (Kibbey), June 26, 1907, MS. Department of State, file 7234/1.

Article II of the extradition convention signed by the United States and Mexico on February 22, 1899 provides for extradition for larceny of property "of the value of twenty-five dollars or more". 1 Treaties, etc. (Malloy, 1910) 1184, 1186; 31 Stat. 1818, 1819.

In connection with a request made in 1907 by the Mexican Ambassador for the provisional arrest and detention with a view to the extradition to Mexico of Gustavo G. Lelevier, the Acting Attorney General informed the Secretary of State that—

The evidence adduced at the hearing showed that the amount taken by Gustave Lelevier did not exceed \$25. Thereupon the extradition magistrate discharged the accused.

The Ambassador to Mexico (Creel) to the Acting Secretary of State (Adee), July 17, 1907, MS. Department of State, file 7672; the Acting Attorney General (Purdy) to the Secretary of State (Root), Nov. 1, 1907, *ibid.* /5-6.

ACT CHARGED A CRIME IN BOTH COUNTRIES

§315

The Supreme Court of the United States, in a case arising out of a request of the Government of Canada for the extradition of an accused person, stated:

Laws not
identical

. . . It is objected that although perjury is mentioned as a ground for extradition in the treaty, the appellant should not be surrendered because the Canadian Criminal Code, §170, defines perjury as covering false evidence in a judicial proceeding "whether such evidence is material or not." As to this it is enough to say that the assertions charged here were material in a high degree and that the treaty is not to be made a dead letter because some possible false statements might fall within the Canadian law that perhaps would not be perjury by the law of Illinois. "It is enough if the particular variety was criminal in both jurisdictions." *Wright v. Henkel*, 190 U.S. 40, 60, 61. There is no attempt to go beyond the principle common to both places in the present case.

Kelly v. Griffin, Jailer of Lake County, Illinois, 241 U.S. 6, 13-14 (1916).

It is not required that the crime charged in extradition proceedings shall be described identically by the laws of the demanding and asylum states. It is sufficient if the particular act charged is criminal in both states. As stated by the Supreme Court of the United States:

The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions. This was held with

reference to different crimes involving false statements in *Wright v. Henkel*, 190 U.S. 40, 58; *Kelly v. Griffin*, 241 U.S. 6, 14; *Benson v. McMahon*, 127 U.S. 457, 465; and *Greene v. United States*, 154 Fed. 401. Compare *Ex parte Piot*, 15 Cox C.C. 208. The offense charged was, therefore, clearly extraditable.

Collins v. Loisel, United States Marshal for the Eastern District of Louisiana, 259 U.S. 309, 312 (1922).

John Jacob Factor was charged in England with the crime of receiving money, knowing the same to have been fraudulently obtained. The law of the State of Illinois, where extradition proceedings were instituted, did not specifically cover such an offense. In passing upon the contention of the accused that under such circumstances his surrender to Great Britain could not be made, the Supreme Court stated:

Crime in particular locality of asylum not required

... The surrender of a fugitive, duly charged in the country from which he has fled with a non-political offense and one generally recognized as criminal at the place of asylum, involves no impairment of any legitimate public or private interest. The obligation to do what some nations have done voluntarily, in the interest of justice and friendly international relationships, see 1 Moore, *Extradition*, §40, should be construed more liberally than a criminal statute or the technical requirements of criminal procedure. *Grin v. Shine*, 187 U.S. 181, 184; *Yordi v. Nolte*, 215 U.S. 227, 230. All of the offenses named in the two treaties are not only denominated crimes by the treaties themselves, but they are recognized as such by the jurisprudence of both countries. Even that with which petitioner is charged is a crime under the law of many states, if not in Illinois, punishable either as the crime of receiving money obtained fraudulently or by false pretenses, or as larceny. See *United States v. Mulligan*, 50 F. (2d) 687. Compare *Kelly v. Griffin*, *supra*, p. 15. It has been the policy of our own government, as of others, in entering into extradition treaties, to name as treaty offenses only those generally recognized as criminal by the laws in force within its own territory. But that policy, when carried into effect by treaty designation of offenses with respect to which extradition is to be granted, affords no adequate basis for declining to construe the treaty in accordance with its language, or for saying that its obligation, in the absence of some express requirement, is conditioned on the criminality of the offense charged according to the laws of the particular place of asylum. Once the contracting parties are satisfied that an identified offense is generally recognized as criminal in both countries, there is no occasion for stipulating that extradition shall fail merely because the fugitive may succeed in finding, in the country of refuge, some state, territory or district in which the offense charged is not punishable. No reason is suggested or apparent why the solemn and unconditional engagement to surrender a fugitive charged with the named offense of which petitioner is accused should admit of any inquiry as to the criminal quality of the act charged at the place of asylum beyond that necessary to

make certain that the offense charged is one named in the treaty. See *Collins v. Loisel*, 259 U.S. 309, 317; *Grin v. Shine*, *supra*, 188.

It is of some significance also that the construction which petitioner urges would restrict the reciprocal operation of the treaty. Under that construction the right to extradition from the United States may vary with the state or territory where the fugitive is found although extradition may be had from Great Britain with respect to all the offenses named in the treaty. While under the laws of Great Britain extradition treaties are not self-executing, and effect must be given to them by an act of Parliament designating the crimes, upon charge of which extradition from Great Britain and its dependencies may be had, all the offenses named in the two treaties have been so designated by Acts of Parliament of 1870, 33 and 34 Victoria, c. 52, as amended by Act of 1873, 36 and 37 Victoria, c. 60.

The District Court for Southern New York, decided, in 1847, that the proviso in the Extradition Treaty with France of November 9, 1843, like that in Article X, did not require that the treaty offense charged to have been committed in France should also be a crime in New York, the place of asylum. *In re Metzger*, *supra*. The precise question now before us seems not to have been decided in any other case, and in no case in this Court has extradition been denied because the offense charged was not also criminal by the laws of the place of refuge. In *Wright v. Henkel*, *supra*, the offense charged, fraud by a director of a company, was, by paragraph 4 of Article I of the Convention of 1889, a treaty offense only if made criminal by the laws of both countries. In *Collins v. Loisel*, *supra*, and in *Kelly v. Griffin*, *supra*, the question was whether the crime charged was a treaty offense. The court so held and the right to extradition was sustained. The offense charged was said to be a crime in both countries, and it seems to have been assumed without discussion, and not questioned, that its criminality at the place of asylum was necessary to extradition. See also *Bingham v. Bradley*, 241 U.S. 511, 518. That assumption is shown here to have been unfounded.

Factor v. Laudenheimer, U.S. Marshal, et al., 290 U.S. 276, 298 (1933).

Asylum state
to determine
whether crime
extraditable

. . . The question of whether or not a fugitive shall be surrendered must of necessity be decided by the government to which the application for the fugitive's surrender is made. The courts of the country which makes the demand are not expected to review the decisions of the government and the courts of the country which makes the surrender. It would place the judicial and executive branches of this government in unseemly and useless conflict to have the courts decide that the demand was not authorized by the treaty after the country on which the demand was made had granted it and the courts of that country had approved it. . . . The defendants may demand here that they be tried only for the offense for which they were extradited, but they cannot defend on their trial in this country by the averment that the demand and surrender were not sanctioned by the treaty after the surrender has had the approval of the courts of the

country on which the demand was made. . . . It is clear that, when such sovereign's discretion is exercised against the surrender of the fugitive, the courts of this country could not interfere. The same rule should apply when, after investigation, the sovereign exercises discretion in favor of granting the demand, especially when the fugitive appeals to the courts of that sovereign and they hold that the surrender was within the treaty.

Greene et al. v. United States, 154 Fed. 401, 407 (C C A. 5th, 1907).

POLITICAL OFFENSES

§316

The Government of the United States has generally excepted from the offenses for which extradition may be granted under treaties to which it is a party, offenses of a purely political character. The treaties seldom undertake to define a political offense.

When the extradition convention, concluded on June 15, 1904 between the United States and Spain, was submitted to the Senate of the United States for its advice and consent to ratification, the Senate adopted three amendments. The Spanish Government accepted the first and third amendments but refused to accept the second, which struck from article III of the convention as signed the words: "An attempt, whether consummated or not, against the life of the Sovereign or of the Head of any State, or against that of any member of his family, when such attempt comprises the act either of murder or assassination or of poisoning, shall not be considered a political offence, or an act connected with such an offence." This led to the conclusion on August 13, 1907 of a protocol embodying a compromise. Article III of the treaty as amended by the protocol reads as follows:

The provisions of this Convention shall not import claim of extradition for any crime or offence of a political character, nor for acts connected with such crimes or offences; and no person surrendered by or to either of the Contracting Parties in virtue of this Convention shall be tried or punished for a political crime or offence. When the offence charged comprises the act either of murder or assassination or of poisoning, either consummated or attempted, the fact that the offence was committed or attempted against the life of the Sovereign or Head of a foreign State or against the life of any member of his family, shall not be deemed sufficient to sustain that such a crime or offence was of a political character, or was an act connected with crimes or offences of a political character.

The Minister to Spain (Hardy) to the Secretary of State (Hay), no. 335, Mar. 17, 1905, MS. Department of State, 142 Despatches, Spain; the Minister to Spain (Collier) to the Secretary of State (Root), no. 373, July 27, 1907, *ibid.*, file 5322/10-11; 35 Stat. 1947, 1955; 2 Treaties, etc. (Malloy, 1910) 1712, 1717.

Judicial
question

On June 12, 1908 the Honduran Minister in Washington addressed the following note to the Secretary of State:

In pursuance to instructions from my Government. I have the honor to state to your Excellency that a treaty of Extradition might be concluded between my country and the United States of America, taking as a model, as far as its provisions are concerned, the treaty between this Republic and Nicaragua. However, I deem it opportune to submit to your Excellency's judgment some modifications which I deem worthy of being taken into consideration, as follows:

1. Add the following provisions to Article IV: "The proper court shall decide in each case whether the crime is a political one or is connected with politics, or whether it is a common law offense."

The foregoing modifications are based on principles embodied in the Political Constitution of Honduras.

The Secretary of State replied:

According to the system of jurisprudence obtaining in the United States, the question as to whether or not an offense is a political one is always decided in the first instance by the judicial officer before whom the fugitive is brought for commitment to surrender. If the judicial authorities refuse to commit the fugitive for surrender on the ground that he is a political offender, or for any other reason, the matter is ended. The executive then has no authority to review the finding. But if the committing magistrate decides that the fugitive is not a political offender and has committed an extraditable offense, the Executive authority still retains an ultimate discretionary power to review the finding of the committing magistrate as to whether or not the fugitive has committed an offense which falls within the purview of an extradition treaty. Bearing in mind, therefore, that under our system of jurisprudence, it is not possible for any fugitive who claims to be a political offender to be extradited unless a judicial officer has found his claim without merit, it is hoped that your Government will be satisfied without insisting upon the insertion of an express stipulation providing that the question as to whether an offense is political shall be decided by the judicial authorities.

Minister Ugarte to Secretary Root, June 12, 1908, and Mr. Root to Señor Ugarte, Oct. 1, 1908, MS. Department of State, file 12172/2.

When the United States sought the extradition from Mexico of Alberto Cabrera on a charge of murder, he endeavored to avoid extradition by setting up the defense that his act was political in character. The President of Mexico stated:

Considering:

That with reference to the exception raised by the accused and based on Paragraph II, of Article III of the Treaty, which paragraph provides "that the extradition shall not be granted when the charge is of a purely political character," it is said by Garraud that, a purely political infraction is that which has not as a predominating feature, but as a sole and exclusive purpose to destroy or change the political regime in one or several of its elements. This regime embraces exteriorly the independence of the nation, the integrity of its territory, and its relations of state with other nations. Interiorly it embraces, the form of Government, the organization of public powers, their mutual relations, and in fact, the political rights of citizens. (French Penal Law, Vol. I, No. 96). According to Rolin: "political infractions are only such as are directed against the political organization or political regime of a State and which may have for a purpose to destroy or disturb said regime or political organization. (Rev. du dr. Inter. 1884, page 166). And in conclusion, according to the doctrine of M. de Bar, mentioned by Soldam: "punishable acts which ostensibly emanate from a tendency to destroy illegally the State and its institutions, should be considered only as political crimes." "The political nature of each act, does not depend from the existence or non existence of political reasons, but only from the nature of the act considered in its essence. Under a juridical aspect, murder continues to be a crime of common order, whatever may be the motives of the same. The act of depriving a fellowman of his life should not be tolerated although political passion may have been its motive, or whether it may have been caused by love, vengeance or ambition. Conscience tells us, except when shadowed by party-feelings, that those who killed President Lincoln, the Duke de Berry, Rossi, that Feischi, Orsini, Nobiling, Passanante or Otero, have been guilty of murder or intent to commit it. Under a moral point of view, some differences may have existed among such men, as there may be also between those who act under the influence of non-political passions; but not for this reason do they fail to be assassins in all the tongues and under all laws. Besides, it is impossible to know in each case, and with certainty, the intention of the guilty party. (Repertoire du Droit Française of A. Carpentier and C. F. du Saint.—Vol 22.—Extraditions, in which article many authors concur in the above doctrine). The Institute of International Law, in its Oxford session, established that acts attended with all the characters of common crimes (murder, arson or robbery) should not be exempted from extradition, owing to the political intention of the actors. In its session at Geneva, held in 1892, it adopted the following resolutions: Article One.—Extradition should not be granted on a purely political charge. Article Two.—It should also be denied on mixed charges or connected with political offenses or crimes, also called relative political crimes, except when it is a matter of crimes of the highest class, under the point of view of morals and common law, such as murder, poisoning, maiming and severe wounds, wilfully and intentionally committed, the attempts to commit such crimes and at-

tempts against property, through arson, explosion or flooding, as well as high class robbery, notably those which are committed by the aid of weapons and violence."

It is in every way unfounded that the murder of Judge Stanley Welch, such as it was committed and taking in consideration all the circumstances appearing from the documents filed with the request for extradition, is a purely political crime, if the same is subjected to the definitions above given for crimes of that specie. The same failing to be purely political is not exempted from extradition, according to paragraph II. of Article III of the Treaty between Mexico and the United States. And even though said Treaty might have excepted also mixed crimes or those connected with politics, the one imputed to Alberto Cabrera could not be subject to the exception by reason of the above mentioned international doctrines mentioned above. And therefore the reasons alleged are entirely unfounded with respect to the first exception raised by the accused.

The Chargé d'Affaires in Mexico (Coolidge) to the Secretary of State (Root), Nov. 18, 1907 (enclosure 4), MS. Department of State, file 7607/23-25, translation.

Ignatius T. T. Lincoln, whose extradition from the United States was requested by the British Government, sought to resist extradition on the ground that the demanding government would prosecute him for a political offense. The court said:

... If it be shown that the acts charged as crime indicate a *political* offense, and not a *criminal* one, as known to the jurisdiction holding the hearing, then certainly the court could not find that there was probable cause as to the commission of a crime. This would involve considering whether the offense as charged is political or criminal.

But it is not a part of the court proceedings nor of the hearing upon the charge of crime to exercise discretion as to whether the criminal charge is a cloak for political action, nor whether the request is made in good faith. Such matters should be left to the Department of State. The government of the United States, through the Secretary of State, should determine whether the foreign government is in fact able to exercise its civil powers, and whether diplomatic and treaty relations are being carried out and respected in such a way that it is safe to surrender an alleged criminal under a treaty.

It is thought by the court that application to the Secretary of State of the United States will furnish full protection against the delivery of the accused to any government which will not live up to its treaty obligations, and that the Secretary of State will be fully satisfied (before delivering the accused to the demanding government) that he is wanted (in the legal sense of that term) upon a criminal charge, that it is not sought to secure him from a country upon which he is depending as an asylum because of political matters, and that the treaty is not actually used as a subterfuge.

If adjournment is necessary to allow the accused in this case to investigate the propriety of his extradition, that application should be made to the Department of State and not to the court.

In re Lincoln, 228 Fed 70, 74 (D.C., E.D.N.Y., 1915).

The Chargé d'Affaires ad interim of Russia requested on December 8, 1908 the extradition of Krishian Rudewitz. During the hearing before the United States Commissioner for the Northern District of Illinois the attorneys for the accused sought to establish that the crimes charged were political offenses. When the United States Commissioner found against the accused, the entire record of the hearing was transmitted to the Secretary of State. The latter informed the Ambassador of Russia as follows:

The testimony of the accused given before the extradition commissioner goes to establish that the accused was a member of the Benen group of the Social Democratic Labor Party, one of the several revolutionary parties in Russia; that later he joined the Zhagran group of that party; that at a regular meeting of the Zhagran group, the death of the Leshinskys and Mrs. Kinze and the burning of the preni-es, were voted as revolutionary acts and measures; and that the accused participated in the business before this meeting. Other witnesses corroborated his testimony that the aim, purpose, and work of this Social Democratic Labor Party were revolutionary and that the death of the persons above named was ordered by one of the organizations of that party. Although there was some discrepance in the evidence as to just which local organization passed the original death decree, this has appeared to be immaterial in view of the evidence to the fundamental fact that some organization of this revolutionary party did actually decree that the persons named should be put to death. The witnesses testifying to these matters were not impeached and the demanding Government introduced no evidence to controvert their testimony.

In view of these facts and circumstances the Department, after a mature and careful consideration of the evidence so adduced in this case, finds it is forced to the conclusion that the offenses of killing and burning with which the accused is charged are clearly political in their nature, and that the robbery committed on the same occasion was a natural incident to executing the resolutions of the revolutionary group and cannot be treated as a separate offense, certainly not as a separate offense by this man without some specific identification of him with that particular act, and of this there is no evidence whatever. Therefore, none of these offenses is such as will afford a proper and sufficient ground for the extradition of the accused to Russia. Neither the treaty nor the law of the United States limits the protection of political characters to acts which are approved by the Government from which extradition is demanded. However much the Government of the United States may deplore or condemn acts of violence done in the commission of acts having political purpose, however unnecessary

or unjustified they may be considered, if those acts were in fact done in the execution of such a purpose, there is no right to issue a warrant of extradition therefor.

The Government of the United States finds itself impelled to these conclusions not only by the generally accepted rules of international law which forbid the surrender of political fugitives, by the principles of internal jurisprudence, which, proclaimed and acted upon by the courts of this and other countries, declare that "a person acting as one of a number of persons engaged in acts of violence of a political character, with a political object, and as part of the political movement and rising in which he is taking part" is a political offender and so entitled to an asylum in this country; and by the long and consistent course of rulings in which the executive branch of this Government has expressly adopted and carried out such laws and principles,—but also by the express provision of Article III of the Extradition Treaty between this Government and Russia, which, in precise terms, prohibits the surrender of political offenders.

The Ambassador replied:

I shall not fail to carry the decision to my Government's knowledge.

At the same time I make it my duty to formulate all reservations as to the conclusions set forth in the said note upon which the decision is based and which essentially differ from the conclusions reached by the magistrate who first had to try the case when he rendered his decision in favor of extraditing the accused.

In a further note dated April 25, 1909 the Ambassador stated:

The Imperial Government is unable in any manner to acquiesce in the views of the Government of the United States set forth in the above mentioned note of the Department of State as to what constitutes a political crime in the sense of the exemption stipulated in the Extradition Treaty.

The Russian Chargé d'Affaires (Kroupensky) to the Secretary of State (Root), Dec. 8, 1908, and Mr. Root to the Russian Ambassador (Rosen), Jan. 26, 1909, MS. Department of State, file 16649/9; Mr. Rosen to Mr. Root, Jan. 26, 1909, *ibid.* /37; Mr. Rosen to Secretary Knox, Apr. 25, 1909, *ibid.* /51.

The Chargé d'Affaires ad interim of Mexico requested on September 22, 1909 the provisional detention of Maximo Martinez, Ines Ruiz, and Gerardo Saenz, fugitives from the justice of Mexico, convicted and sentenced on charges of murder, robbery, bodily injuries, and arson. Ines Ruiz was arrested and given a hearing before the United States Commissioner at San Antonio, Texas, and was released on February 9, 1910.

Pursuant to the request made on February 12, 1910 for the extradition of Ruiz, the accused again was arrested. The Assistant Secretary

of State in replying on February 15, 1910 to the Ambassador's request stated that—

the Department has received information going to show that it was charged in the recent proceedings before United States Commissioner Scott in this same case, that although Ruiz was in 1896 surrendered by the United States Government to the Mexican Government upon charges of murder, robbery and arson, the fugitive was, as a matter of fact, upon his return to Mexico, tried upon a charge of participating in the "Garza Revolution" and was sentenced to be shot for such participation. You will at once perceive and appreciate that if the facts be as thus suggested it would appear that a proper interpretation of the Extradition Treaty between the United States and Mexico of 1899, which provides that extradition shall not take place "when the crime or offense shall be of a purely political character," could scarcely be deemed either to entitle your Government to request the surrender of this fugitive, or to warrant the Government of the United States in surrendering him should the request therefor finally be made upon it.

The Ambassador replied:

The provisions of the treaty in force between the two countries applicable to the case are perfectly clear and precise. Section 2 of article 8 provides that if a person whose extradition is asked shall have been convicted of an offense, it will be sufficient to produce a duly authenticated copy of the sentence of the court, to prove the escape of the offender and to identify him in order to obtain his extradition.

Nevertheless, the Commissioner in the case appears to have entered upon a consideration of its merits, as though it were that of a person charged with an offense and not that of an offender under sentence.

To this, the Acting Secretary of State responded:

While the Department has no disposition to enter upon a discussion which, under the present status of the case, would be purely academic, the Department deems it best to call to your attention, what indeed you will readily perceive, that the Government of Mexico would doubtless no more care to request the extradition of a person as convicted of a non-extraditable crime than it would wish to ask for the extradition of a person to be tried for such a crime. It seems obvious that neither case would fall within the purview of the treaty. Moreover, the Department is of the opinion that the plea of a fugitive that the crime with which he is charged is not extraditable is a plea which remains to the jurisdiction of the Commissioner and may, therefore, always be raised whether or not the surrender of the fugitive is requested by reason of a conviction for a crime or because he is merely charged with a crime.

The Department does not, however, intend by this to suggest that a Commissioner before whom a person convicted of a crime was brought for hearing, could examine into the question as to

whether or not such a fugitive were guilty of the crime charged. It is thought that this question should be considered as closed by reason of the conviction in the country from which the fugitive comes, but this principle would not prevent the fugitive from raising the question that the crime of which he had been convicted was not an extraditable offense.

Chargé Davalos to Secretary Knox, Sept. 22, 1909, MS. Department of State, file 21671; Ambassador Barra to Mr. Knox, Feb. 12, 1910, and the Assistant Secretary of State (Wilson) to Señor Barra, Feb. 15, 1910, *ibid.* 21671/14; Señor Barra to Mr. Knox, Feb. 17, 1910, and Mr. Wilson to Señor Barra, Feb. 23, 1910, *ibid.* /18.

The United States Circuit Court of Appeals, Second Circuit, in an opinion dated November 4, 1929, held that an alien may be deported for political offenses committed in the United States and pointed out the distinction between such action and extradition for a purely political offense.

United States ex rel. Giletti v. Commissioner of Immigration, Ellis Island, New York Harbor, 35 F. (2d) 687, 689 (1929).

ESCAPE FOLLOWING CONVICTION

§317

The status of an escaped convict is not to be confused with that of one who has been convicted *in absentia*. The latter is treated, under the practice prevailing in the United States, merely as a person charged with the commission of a crime. The only material difference between the two classes of cases is that with respect to the evidence which the demanding government is required to submit. If the fugitive was before the court when convicted, a copy of the sentence is presented as evidence. If he was convicted *in absentia*, evidence of the character of that required in cases where the accused has not been tried must be presented. Article XI of the treaty of extradition concluded on August 1, 1924 between the United States and Finland, for example, provides:

If the fugitive criminal shall have been convicted of the crime for which his surrender is asked, a copy of the sentence of the court before which such conviction took place, duly authenticated, shall be produced.

44 Stat. 2002, 2005; 4 Treaties, etc. (Trenwith, 1938) 4125, 4127.

The Secretary of State said in 1925 in a letter to the Governor of Wisconsin in connection with a request for the extradition from Canada of Ed Malen:

It is observed that in the documents enclosed with your letter the charge upon which the fugitive's extradition is sought is that

of having escaped from the Wisconsin State Prison. The extradition treaties in force between the United States and Great Britain which are applicable to Canada do not provide for extradition on the charge above mentioned. However, since it is observed that Malen was convicted in your state upon the charge of obtaining money under false pretences, the Department has telegraphed the American Consul at Hamilton to request Malen's provisional arrest and detention as having been convicted of the latter offence.

The papers transmitted with your letter are returned in order that they may be amended to conform to the basis upon which extradition will have to be sought for Malen as above indicated.

Secretary Kellogg to Governor Blaine, May 4, 1925, MS. Department of State, file 242.11M29/2.

A person convicted of a crime and subsequently paroled who proceeds to a foreign country in violation of the parole may be extradited. While extradition is granted on the charge on which conviction was had, proof of the parole may be required. **Parole**

United States Commissioner Smith to the Secretary of State (Bryan), Nov. 6, 1913, MS. Department of State, file 211.42B43/2.

Elijah Lane, after conviction in 1916 in Kansas but before sentence was imposed, fled to Canada. In acknowledging the receipt of the request of the Governor of Kansas for the extradition of the fugitive, the Acting Secretary of State said:

You have doubtless observed that Article VII of the Extradition Convention of 1889 with Great Britain provides that, in case of a fugitive criminal alleged to have been convicted of a crime for which his surrender is asked, in addition to the copy of record of conviction and of the sentence of the Court, there shall be produced evidence proving that the prisoner is the person to whom such sentence refers.

It appears that the fugitive Lane fled the State of Kansas before sentence was pronounced upon him, but the Department presumes that the lack of such sentence will not operate to prevent his surrender upon the evidence of his conviction and identity.

The Acting Secretary of State (Polk) to the Governor of Kansas (Capper), May 25, 1916, MS. Department of State, file 242.11L24.

Sam Finkelstein was convicted in 1921 in Cook County, Illinois, of burglary and sentenced to 20 years' imprisonment. He was paroled on March 6, 1931 and thereafter went to Canada. On August 6, 1931 a warrant for parole violation was issued by the Illinois State Reformatory. In informing the acting superintendent of supervision of parolees regarding the procedure to obtain the extradition of the accused from Canada, the Department of State said:

The Department encloses a copy of its Memorandum Relative to Applications for the Extradition of Fugitives from Justice

and informs you that it could only take action in this matter upon the request of the Governor of Illinois, which should be based upon the charge on which Finkelstein was convicted and supported by documents, in duplicate, including a duly authenticated copy of the record of conviction and sentence of the court, a duly authenticated copy of the parole on which the fugitive was released, and an affidavit by an appropriate official, duly authenticated over the State seal as to the legal effect of the indeterminate sentence imposed upon the fugitive and the bearing thereon of the parole which was granted. Copies of the warrant issued for Parole Violation should also be furnished.

The Legal Adviser of the Department of State (Hackworth) to the acting superintendent of supervision of parolees (Sullivan), July 12, 1937, MS. Department of State, file 242.11 Finkelstein, Sam/2.

The chief parole officer of the State of New York inquired in 19 of the Secretary of State whether, when it was desired to extradite from Canada a parole violator, the extradition papers should be based upon the crime of which the fugitive was convicted or upon the parole violation. The Department of State replied:

Since violation of parole is not made extraditable by treaty provisions in force between the United States and Canada, it would be necessary to base any request for the extradition of such a violator on the crime of which he was convicted. There are no treaty provisions in force between the United States and Canada which would operate as a bar against the extradition of parole violators based upon their original conviction. Moreover, the Department is not aware of any decision rendered in Canada which would militate against the extradition of such persons.

Article VII of the Extradition Convention of July 12, 1889 provides as follows:

"The provisions of the said Tenth Article [of the treaty of 1842] and of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

"In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the Convention [*conviction*] and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers."

In addition to the evidence mentioned in the quoted treaty provision it would be essential in the case of requests for the extradition of parole violators to set forth the pertinent laws of the state, both those defining and penalizing the crime of which the fugitive had been convicted, and those relating to parole and to establish that the fugitive had not completed service of the sentence which was imposed upon him.

The chief parole officer of the State of New York (Dupree) to the Secretary of State (Hull), Mar. 1, 1940, MS Department of State, file 242.11 Orman, Allen/1; the Legal Adviser of the Department of State (Hackworth) to Mr. Dupree, Mar 8, 1940, *ibid* /2.

The Governor of New York requested in 1938 the provisional arrest and detention of George Award, a parole violator, with a view to his extradition from Canada for attempted larceny. The Secretary of State informed the Governor that—

Attempted larceny does not seem to be extraditable by treaty provisions in force between United States and Canada. Actual commission of offense apparently is required in which fugitive was principal or participant.

Even if offense charged were extraditable, fact that period of sentence imposed has expired would seemingly constitute insuperable obstacle for extradition, although parole violation has occurred in meantime.

Governor Lehman to Secretary Hull, telegram of July 19, 1938, MS. Department of State, file 242.11 Award, George/1; Mr. Hull to Mr. Lehman, telegram of July 21, 1938, *ibid*. /8.

NATIONALS

NATIONALS OF ASYLUM STATE

§318

While most of the treaties of extradition between the United States and foreign countries either disclaim any obligation to surrender citizens of the state of asylum—which, in the United States, amounts to a prohibition against surrender—or make their surrender discretionary with that state, the inclusion of such a provision is not the result of a fixed policy on the part of the United States. As a matter of fact, generally speaking, the policy of the United States is to surrender citizens. In the absence of a provision in the treaty restricting surrender, all fugitives, without regard to citizenship are subject to extradition if the cases are otherwise covered by the treaty. Policy

The extradition treaty concluded on May 25, 1904 between the United States and Panama (34 Stat. 2851; 2 Treaties, etc. [Malloy, 1910] 1357, 1359) provides in article V:

Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this Treaty.

While the treaty appears to be general in its application, in that it does not expressly except the Panama Canal Zone, an exception has in fact been made, under the authority contained in article XVI of the convention concluded on November 18, 1903 (33 Stat. 2234, 2238; Panama
Canal Zone

2 Treaties, etc. [Malloy, 1910] 1349, 1354), by an informal arrangement applying solely to extradition between the Canal Zone and the Republic of Panama. This agreement resulted in the promulgation by the Governor of the Panama Canal of an order of September 19, 1906 and by the President of the Republic of Panama of a decree of September 22, 1906. Provisions identical with those of the Governor's order are contained in sections 881 to 892 of title 6 of the Canal Zone Code. Section 881 reads:

All persons who have been condemned, prosecuted or accused before the courts of the Republic of Panama as authors or accomplices of crimes, transgressions or offenses against the laws of said Republic, who seek refuge in the Canal Zone, shall be, upon apprehension, taken into custody by the authorities of the Canal Zone and delivered to the authorities of the Republic of Panama, upon the demand of the Government of that Republic and compliance with the procedure hereinafter prescribed.

Notwithstanding the provision last quoted the United States did not depart completely from the provision of the earlier treaty, in as much as it is expressly provided in section 882, title 6, of the Canal Zone Code that:

The Government of the Canal Zone is at liberty to decline compliance with a demand of the Government of the Republic of Panama for the arrest and delivery to the authorities of said Republic of a fugitive from the justice of the Republic of Panama when said fugitive is a citizen of the United States. The discretion hereby reserved shall be exercised by the Governor of the Panama Canal.

In a note dated January 31, 1933 to the Minister of Panama, Assistant Secretary White stated with reference to article V of the extradition treaty of 1904 quoted above:

It has been the practice of the United States to interpret treaty provisions of this nature as containing no grant of power to the United States to surrender American citizens. However, if, as is assumed from the reciprocity implied in the present request, your Government is prepared as a general practice to grant the surrender of Panaman citizens to the United States under the provisions of the Treaty, the Government of the United States does not care to raise the question at this stage in the instant case as to the appropriate interpretation of the quoted treaty provisions.

Assistant Secretary White to Minister Alfaro, Jan. 31, 1933, MS. Department of State, file 211.19 McLaney, Robert and Wood/8.

France

Article V of the treaty of 1909 between the United States and France provides that "Neither of the contracting Parties shall be bound to deliver up its own citizens or subjects." 3 Treaties, etc. (Redmond, 1923) 2580, 2582; 37 Stat. 1526, 1530. A similar provi-

sion was contained in article VI of the treaty of 1861 between the United States and Mexico. 1 Treaties, etc. (Malloy, 1910) 1123, 1127; 12 Stat. 1199, 1202. This latter provision was interpreted by the District Court of the United States for the Western District of Texas in the case of *Ex parte McCabe*, 46 Fed. 363 (1891), wherein it was held that the United States could not surrender an American citizen. The Department of State followed this ruling in construing other similar treaty provisions. When, therefore, in 1936 the French Government requested the extradition, under the treaty of 1909, of B. Coles, George W., and Aubrey Neidecker, stated in the request to be American citizens, the Department declined to issue the certificate provided for in the treaty. Nevertheless, the French authorities were able to bring about the provisional arrest and detention of the men, who immediately petitioned for writs of *habeas corpus*. The case was carried to the Supreme Court of the United States, which said:

The question is not one of policy, but of legal authority. The United States has favored the extradition of nationals of the asylum state and has sought—frequently without success—to negotiate treaties of extradition including them. Several of our treaties have made no exception of nationals. . . . Where treaties have provided for the extradition of persons without exception, the United States has always construed its obligation as embracing its citizens. . . .

The effect of the exception of citizens in the treaty with France of 1909—now under consideration—must be determined in the light of the principles which inhere in our constitutional system. . . . The surrender of its citizens by the Government of the United States must find its sanction in our law.

. . . As stated by John Bassett Moore in his treatise on Extradition—summarizing the precedents—"the general opinion has been and practice has been in accordance with it, that in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power." Counsel for the petitioners do not challenge the soundness of this general opinion and practice. It rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

It is a familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties. . . . But, in this instance, there is no

question for construction so far as the obligations of the treaty are concerned. The treaty is explicit in the denial of any obligation to surrender citizens of the asylum state—"Neither of the contracting Parties shall be bound to deliver up its own citizens."

Applying, as we must, our own law in determining the authority of the President, we are constrained to hold that his power, in the absence of statute conferring an independent power, must be found in the terms of the treaty and that, as the treaty with France fails to grant the necessary authority, the President is without power to surrender the respondents.

However regrettable such a lack of authority may be, the remedy lies with the Congress, or with the treaty-making power wherever the parties are willing to provide for the surrender of citizens, and not with the courts.

Valentine, Police Commissioner of New York City, et al. v. United States ex rel. B. Coles Neidecker, 299 U S 5, 7-18 (1936).

An opportunity was afforded in 1923 to avert such a decision as was rendered in the *Neidecker* case just mentioned when the French Ambassador, acting on instructions from his Government, proposed a modification of article V of the treaty of 1909 to provide that the United States should agree to surrender all persons, including its nationals, and France should undertake to surrender all persons except its nationals. The Secretary of State said in reply:

I have the honor to inform you that careful consideration has been given to the statements contained in the aide memoire of your Embassy dated December 4, 1923, wherein it is pointed out that in Article 5 of the Extradition Treaty between the United States and France provision is made that the contracting parties shall not be bound to surrender their own citizens under the Convention; that in view of this provision the United States considers itself as without authority to surrender its citizens to France, in consequence of which American citizens committing crimes in France and fleeing to this country go unpunished; and that the law of France prohibits the surrender of French citizens in extradition cases, but makes provision for their trial in France for offenses committed abroad. In view of this situation your Embassy considers that the practical operation of the treaty provision is disadvantageous to France and suggests that the treaty be amended either by inserting a provision whereby the United States undertakes to surrender all persons while France undertakes to surrender all persons except her nationals, or by adding to Article 5 as now in force the following:

"Provided their law permits of their trying and punishing offenses committed by their nationals abroad."

Since, generally speaking, the law of the United States does not provide for the trial and punishment of its nationals for offenses committed abroad, the second alternative suggested by your

Embassy would appear to be identical for all practical purposes with the first suggestion.

The Department recognizes that it is an undesirable condition of affairs under which American citizens committing crimes abroad can escape punishment by fleeing to this country, but its experience with relation to the practical working out of the system of law under which citizens of a country are placed upon trial in their own land for offenses committed abroad would seem to indicate that the inequality existing as a result of the provisions of Article 5 of the Extradition Treaty between the United States and France is not perhaps so great as your Embassy appears to suppose.

It seems to the Department from its information as to the results of the trials in their home countries of persons who are charged with the commission of offenses in the United States that the theory of the law under which such persons thereby meet their just deserts is not largely borne out in practice. The Department's information on this point would appear to indicate that juries in foreign countries are not as a rule thoroughly in sympathy with the idea of punishing their fellow countrymen for offenses committed abroad, and their reluctance in this respect may perhaps be due to the fact that ordinarily witnesses to the offense are not sent abroad to give their testimony in court, but the evidence for the prosecution is made up in writing which as a natural consequence does not appeal so strongly to jurymen as would the appearances of witnesses in person.

It is believed that while the present treaty arrangement relative to the surrender of citizens, theoretically at least, works to the disadvantage of France, the arrangement proposed by your Embassy, for the reasons above indicated, would operate to the disadvantage of the United States.

Assurances may perhaps reasonably be given that if your country should see fit to modify its law so as to permit the extradition of its citizens the United States would be disposed to enter into a treaty obligation with France whereby the existing provision excepting citizens of the contracting parties from the obligation to extradite should be eliminated.

No further action was taken by either Government.

Ambassador Jusserand to Secretary Hughes, Dec. 4, 1923, and Mr. Hughes to Mr. Jusserand, Jan. 21, 1924, MS Department of State, file 211.51/32.

Following the decision by the District Court in the case of *Ex parte McCabe*, 46 Fed. 363 (1891), the United States and Mexico negotiated a new convention, article IV of which provided, as in the earlier treaty, that neither of the contracting parties "shall be bound to deliver up its own citizens", but a new provision was added that "the executive Mexico

authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so". 1 Treaties, etc. (Malloy, 1910) 1184, 1186; 31 Stat. 1818, 1822. As to this provision the District Court of the United States for the Northern District of Texas said:

The procedure, therefore, is for the examining court, under the statute mentioned, to determine as to the commission of the offense and whether it comes within the treaty provisions. If it does so, then the entire matter is certified to the Secretary of State at Washington for such action as the executive department may consider appropriate.

In re Lucke, 20 F. Supp. 658, 659 (1937).

The Ambassador to Mexico was instructed on December 1, 1926 to inform the Mexican Foreign Office that the action of the President of Mexico in the case of Juan Adams and in other recent extradition cases seemed to indicate a settled policy of the Mexican Government to decline to surrender to the United States fugitives who are Mexican citizens, notwithstanding the power to surrender in such cases under article IV of the convention of 1899. The instruction having been executed, the Mexican Minister of Foreign Affairs replied:

. . . I can say to Your Excellency that there exists no planned object on the part of the Mexican Government to deny the American Government the extradition of Mexicans solely because of their nationality, but that in each particular case, after a careful study of the circumstances, it decides in favor of or against the demand of extradition in question, in accordance with the power of Article IV of the Extradition Treaty.

Under Secretary Olds to Ambassador Sheffield, Dec. 1, 1926, MS. Department of State, file 212.11Ad1/18; the Mexican Minister of Foreign Affairs (Saenz) to Mr. Sheffield, Jan. 13, 1927, *ibid.* /21.

Following a request by the Ambassador of Mexico for the provisional arrest and detention, with a view to extradition to Mexico, of Henry Phillips Ames, alias Enrique Tames, charged in Mexico with robbery and embezzlement, extradition proceedings were instituted before the United States Commissioner for the Southern District of California. In his decision on May 21, 1928 the Commissioner stated:

. . . I have not taken into consideration the citizenship of the accused, other than to make the finding that the accused is a native born American citizen. The Treaty of Extradition between the United States of America and the United States of Mexico, under which this proceeding is brought, in Article 4 thereof, places the discretion in the Secretary of State to determine the weight that should be given to the citizenship of the accused in either granting or denying extradition. However, from a consideration of the facts of this case, I recommend to the Secretary of State that

extradition be denied on the ground of the accused's citizenship, unless it be affirmatively shown that the accused will be given a fair trial and that the proceeding is not tainted by any political considerations.

The Secretary of State, in a note dated June 4, 1928, informed the Mexican Ambassador that Ames would not be extradited. It was added:

Should Your Excellency's Government decide to alter the practice which it has consistently followed since 1923 in refusing to surrender Mexican citizens to the United States, this Government will be glad to reconsider its position with respect to the reversed situation.

Following the receipt of assurances that the Mexican Government did not have the "deliberate intention of refusing the extradition of Mexicans to the United States, simply because of their nationality", the Secretary of State informed the Chargé d'Affaires of Mexico that the Department "in the future will be governed by the special circumstances in each case, in the same manner as your Embassy states your Government deals with the reversed situation".

Ambassador Téllez to Secretary Kellogg, Jan. 7, 1928, MS. Department of State, file 211.12Am3/1; commissioner's certificate, May 21, 1928, *ibid.* /16; Mr. Kellogg to Señor Téllez, June 4, 1928, *ibid.* /19; Mr. Kellogg to the Mexican Chargé d'Affaires (Padilla-Nervo), Dec. 13, 1928, *ibid.* /27.

On June 27, 1939 the Department of State informed the Mexican Embassy of its refusal to grant the extradition of Severiano Riojas, stating that—

in determining what action I should take in this matter I have been obliged to take into consideration the consistent practice of your Government in declining to extradite Mexican citizens to the United States under the option set forth in Article IV of the Extradition Treaty of 1899 between the United States and Mexico. It seems clear to me that the true basis of action under extradition treaties should be reciprocity, and therefore I cannot convince myself that the United States should surrender American citizens to Mexico while Mexico continues its long-existing practice of refusing reciprocal action.

The Secretary of State (Hull) to the Mexican Chargé d'Affaires (Quintanilla), June 27, 1939, MS. Department of State, file 211.12 Riojas, Severiano/40.

Although the Secretary of State, in the exercise of his discretion, refused to surrender Riojas in the case just mentioned, such refusal is not an established practice, as appears from the action of the Department of State in transmitting, on December 12, 1939, to the Mexican

Ambassador a warrant for the surrender of Juan Delgado Ortiz, an American citizen.

The Counselor of the Department of State (Moore) to the Mexican Ambassador (Nájera), Dec. 12, 1939, MS. Department of State, file 211.12 Ortiz, Juan Delgado/16.

Great
Britain

Marx, Houghton & Byrne, attorneys for Arthur Preston Green and Charles Rohrer, whose extradition had been requested by the Government of Great Britain, sought to have the Secretary of State decline to surrender Rohrer on the ground that he was a citizen of the United States. The Department of State decided as follows:

In view of the fact that the treaties of extradition between the United States and Great Britain provide for the surrender of all "persons" who have committed an extraditable offence and have fled to the jurisdiction of the other contracting party the Department cannot refuse to surrender an American citizen simply on the ground of his nationality (See Moore on Extradition, par. 138).

Marx, Houghton & Byrne to Secretary Root, June 1, 1907, MS. Department of State, file 6551/6-7; Mr. Root to Marx, Houghton & Byrne, June 11, 1907, *ibid.* /10.

Italy

Article I of the convention of 1868 between the United States and Italy provides that the two Governments mutually shall deliver up all persons who, having been convicted of or charged with any of the crimes specified, committed within the jurisdiction of one of the contracting parties, should seek an asylum in the other. 1 Treaties, etc. (Malloy, 1910) 966, 967; 15 Stat. 629. It was claimed by counsel for Porter Charlton, whose extradition had been requested by the Government of Italy, that the word "persons" as used in article I did not include citizens of the asylum country. The Supreme Court of the United States held to the contrary, stating:

That the word "persons" etymologically includes citizens as well as those who are not, can hardly be debatable. The treaty contains no reservation of citizens of the country of asylum. The contention is that an express exclusion of citizens or subjects is not necessary, as by implication, from accepted principles of public law, persons who are citizens of the asylum country are excluded from extradition conventions unless expressly included. This was the position taken by the Foreign Minister of Italy in a correspondence in 1890 with the Secretary of State of the United States, concerning a demand made by the United States for the extradition of Bevivini and Villella, two subjects of Italy whose extradition was sought, that they might be tried for a crime committed in this country. Their extradition was refused by Italy on account of their Italian nationality. The Foreign Minister of Italy advanced in favor of the Italian position these grounds: (a) That the Italian Penal Code of 1890, in express terms provided that, "the extradition of a citizen is not permitted;" (b)

That a crime committed by an Italian subject in a foreign country was punishable in Italy, and, therefore, there was no ground for saying that unless extradited the crime would go unpunished; and (c) That it has become a recognized principle of public international law that one nation will not deliver its own citizens or subjects upon the demand of another, to be tried for a crime committed in the territory of the latter, unless it has entered into a convention expressly so contracting, and that the United States had itself recognized the principle in many treaties by inserting a clause exempting citizens from extradition. (United States Foreign Relations 1890, p. 555.) Mr. Blaine, then Secretary of State of the United States, protested against the position of the Italian government and maintained the view that citizens were included among the persons subject to extradition unless expressly excluded. His defense of the position is full and remarkably able. It is to be found in United States Foreign Relations for 1890, pp. 557, 566.

We shall pass by the effect of the Penal Code in preventing the authorities of Italy from carrying out its international engagements to surrender citizens, for that has no bearing upon the question now under consideration, which is, whether under accepted principles of international law, citizens are to be regarded as not embraced within an extradition treaty unless expressly included. That it has come to be the practice with a preponderant number of nations to refuse to deliver its citizens, is true; but this exception is convincingly shown by Mr. Blaine in his reply to the Foreign Minister of Italy and by the thorough consideration of the whole subject by Mr. John Bassett Moore, in his treatise on extradition, ch. V, pp. 152, 193, to be of modern origin. The beginning of the exemption is traced to the practice between France and the Low Countries in the eighteenth century. Owing to the existence in the municipal law of many nations of provisions prohibiting the extradition of citizens, the United States has in several of its extradition treaties clauses exempting citizens from their obligation. The treaties in force in 1910 may, therefore, be divided into two classes, those which expressly exempt citizens, and those which do not. Those which do contain the limitation are by far the larger number.

The conclusion we reach is, that there is no principle of international law by which citizens are excepted out of an agreement to surrender "persons," where no such exception is made in the treaty itself. Upon the contrary, the word "persons" includes *all* persons when not qualified as it is in some of the treaties between this and other nations. That this country has made such an exception in some of its conventions and not in others, demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word "persons." This interpretation has been consistently upheld by the United States, and enforced under the several treaties which do not exempt citizens. That Italy has not conformed to this view, and the effect of this attitude will be considered later. But that the United States has always construed its obligation as embracing its citizens is illus-

trated by the action of the executive branch of the Government in this very instance. A construction of a treaty by the political department of the Government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.

The effect of yielding to the interpretation urged by Italy would have brought about most serious consequences as to other treaties then in force. One of these was the extradition treaty with Great Britain made as far back as 1843. Inasmuch as under the law of that country, as of this, crimes committed by their citizens within the jurisdiction of another country were punishable only where the crime was committed, it was important that the Italian interpretation should not be accepted.

Charlton v. Kelly, Sheriff of Hudson County, New Jersey, 229 U.S. 447, 465-469 (1913).

With a view to ascertaining the practice of other nations in cases similar to the *Charlton* case, the American Ambassador in London was directed to make specific inquiry regarding the practices between Great Britain and Austria, Belgium, Denmark, Germany, Italy, Luxembourg, Mexico, Morocco, Netherlands, Portugal, Rumania, Russia, San Marino, Serbia, Sweden, Norway, and Uruguay. The Ambassador replied:

"... Extradition practice in the United Kingdom is not dependent on reciprocity, and ... it would not follow that this country would refuse to surrender a British subject to a foreign State, in consequence of that State being precluded by its Municipal law from surrendering its own subjects or citizens. Most foreign countries have jurisdiction to try their nationals for offenses committed outside their territory; this country has not, except in the case of a very few crimes. It follows therefore that refusal by the United Kingdom to surrender nationals stands on a very different footing from the like refusal by other countries, because it necessarily implies that a British subject who commits a crime abroad and escapes to British territory is immune from any punishment; and it is considered only reasonable that the United Kingdom should be prepared to surrender nationals even to states which do not surrender their own.

"It appeared from an enclosure to the note from the Foreign Office that treaty obligations required the surrender of British subjects to Luxembourg, Spain and Switzerland although those countries refused to surrender their own subjects; that treaties with Austria, Belgium, Mexico, Netherlands, Roumania, Russia, San Marino, and Servia made the surrender of nationals facultative; and that treaties with Denmark, Germany, Italy, Norway, Portugal, Sweden, and Uruguay prohibit the surrender of nationals, although the treaty with Portugal permits the surrender of naturalized subjects for crimes committed prior to naturalization."

The Assistant Secretary of State (Wilson) to the Ambassador in London (Reid), telegram of July 7, 1910, MS. Department of State, file 211.65C38/29A; Mr. Reid to Secretary Knox, July 27, 1910, *ibid.* 445.

Upon direct telegraphic request from the district attorney for Rensselaer County, New York, the American Consul at Naples caused the arrest by the local authorities of Vincenzo Lanzillo, charged in

New York with murder. In bringing the matter to the attention of the Governor of New York, the Secretary of State referred to the fact that the Italian Government regarded the convention between the United States and Italy as inapplicable to an Italian subject who had committed crimes in the United States and returned to Italy. In a letter dated December 18, 1907 addressed to the Assistant Secretary of State by the District Attorney of Rensselaer County, it was stated that the accused had been naturalized at the city of Troy on August 8, 1901. The secretary to the Governor of New York on the following day inquired whether the naturalization of the accused would affect his extradition. In instructing the Ambassador at Rome to request the extradition of the accused, the Acting Secretary of State said:

It is just possible that some question may be raised on account of the fact that the fugitive is a naturalized American citizen of Italian origin. The Department does not think this is at all likely since it does not understand that the Italian Government denies the right of the United States to confer American citizenship upon Italian subjects, or the efficacy of such naturalization when so conferred to work a change of allegiance. Even in the military cases it is the understanding of this Department that the Italian Government merely contends that the liability to perform military service is a personal obligation which cannot be discharged by change of allegiance.

The Department does not, therefore, anticipate any difficulty as regards this point, which will naturally not be raised by you. However, should the question arise, the foregoing suggestions will serve to indicate the position which should be maintained by the Embassy.

The extradition of the accused was denied without the reason therefor being made known to the Department of State. It does not appear whether the Italian authorities undertook to try the accused in Italy.

The Secretary of State (Root) to the Governor of New York (Hughes), Dec. 5, 1907, MS. Department of State, file 10225; the district attorney of Rensselaer Cy., N.Y. (O'Brien) to the Assistant Secretary of State (Bacon), Dec. 18, 1907, *ibid.* 10225/4; the secretary to the Governor of New York (Fuller) to Mr. Root, Dec. 19, 1907, *ibid.* /5; Mr. Bacon to the Ambassador at Rome (Griscom), Feb. 4, 1908, *ibid.* /13-14; the Italian Ministry of Foreign Affairs to Mr. Griscom, Feb. 27, 1909, *ibid.* /32-33.

NATIONALS OF A THIRD STATE

§319

After L. A. Armitage, a British subject, had been arrested at the request of Colombia with a view to his extradition, the British Consul

Non-enemy

at Jacksonville, Florida, called to the attention of the United States attorney at that place article IX of the extradition convention of 1888 between the United States and Colombia, reading:

In case a person, who is equally a foreigner in the United States of America and in the Republic of Colombia, takes refuge in either country, after having committed any of the foregoing crimes, within one or the other jurisdiction, extradition can be accorded only after the Government, or its Representative, of which the criminal is a citizen or subject, has been duly informed, and afforded an opportunity to file objections to the extradition.

Pursuant to the provisions just quoted, the Assistant Secretary of State in a note dated May 2, 1930 duly informed the Ambassador of Great Britain of the action taken in the *Armitage* case up to the date of the note.

1 Treaties, etc. (Malloy, 1910) 323, 325; 26 Stat. 1534, 1538; the British Consul (Mucklow) to the United States attorney (Hughes), Apr. 24, 1930, MS. Department of State, file 211.21 Armitage, L.A./10; the Assistant Secretary of State (White) to the British Ambassador (Lindsay), May 2, 1930, *ibid.* /11.

Enemy of
demanding
government

The Chargé d'Affaires of Germany requested on February 10, 1940 that the Secretary of State take "the necessary steps against the extradition" of Alexander Strakosch, alias Alexander Graham, a German national whose surrender had been requested by Great Britain. The basis for the request was stated to be that extradition of a German national to "a power which is at war with the German Reich, would violate the usages of international law, as the person named, whether guilty or innocent, would be exposed to internment in Great Britain". In a later note the German Chargé d'Affaires said:

A surrender to Great Britain of Germans liable to military service would be a violation of neutrality, as it is calculated to weaken German military power to the benefit of Great Britain, since it prevents the persons liable to military service from reporting for duty. In addition, there would be no guarantee that the accused person would be able to leave Great Britain after being cleared of the charge or serving his sentence and would not in reality be prevented from doing so because of military operations, so that his internment would have to be provided for. Aside from that, transportation to Great Britain is subject to great dangers in consequence of the war. The accused person should not be exposed to such dangers against his will.

The Counselor of the Department of State, in informing the German Chargé d'Affaires of the decision of the Department, said that—the Department has concluded that it is obligated by the existing treaty of extradition between the United States and Great Britain to surrender Strakosch.

No precedent has been found in support of your Embassy's contention that such surrender, Great Britain and Germany being at war, would be an unneutral act and, in this relation, I point out that neutrality implies impartiality in matters affecting an existing war and does not signify that a neutral should permit the war to interfere with the carrying out of its treaty provisions in force dealing with the usual and regular enforcement of criminal justice.

So far as concerns the dangers considered by your Embassy to be involved in the transportation of Strakosch to England on a British vessel, it is pertinent to observe that Strakosch will be surrendered in the United States and that the method of his transportation to England is not one which can be dealt with by this Government.

With regard to the fear expressed by your Embassy that following the disposition of the charges on which Strakosch is surrendered and assuming that the war between Germany and Great Britain should then continue, he would be interned, I advise you that in this relation the attention of the British Embassy has been called to the . . . provisions of Article 7 of the Extradition Treaty of 1931 between the United States and Great Britain.

In a subsequent note to the German Chargé d'Affaires, in reply to one from him dated June 1, 1940 in which he reiterated the position previously taken by him, the Department stated:

The observations regarding this matter which you have sent to the Department at various times have received full consideration. Indeed, the objections raised to extradition by your Embassy were carefully considered at the outset, as stated in my note of May 9, 1940. In that note it was pointed out that neutrality does not signify that a neutral should permit the war to interfere with the carrying out of its treaty provisions in force dealing with the usual and regular enforcement of criminal justice.

The Department, in taking this position, had fully considered the views of your Government as expressed in its note of March 26, 1940. The position indeed is the same as that which your own Government has taken on other occasions. It is interesting to note that on January 8, 1917, Germany and Russia being then at war, your Embassy addressed a note to this Department, requesting the extradition of a Russian subject named Vladislaus Kubicki; and further requested that this Department take steps to prevent the removal of the fugitive by enemies of your country, after his surrender, from the steamer on which he would be placed with a view to his return to Germany. Due in part to the somewhat unusual circumstances, and to the break in relations between the United States and Germany that soon resulted, proceedings looking to Kubicki's extradition lapsed, and were not thereafter renewed. Yet the basic contention then made by your Government rested upon the same ground as that taken by this Department in the matter of the extradition of Strakosch.

The Chargé d'Affaires ad interim of Germany (Thomsen) to the Secretary of State (Hull), Feb 10 and Mar. 26, 1940, MS. Department of State, file 211.41 Graham, Alexander/14, /21; the Counselor of the Department of State (Moore) to Mr. Thomsen, May 9, 1940, *ibid.* /48; the Assistant Secretary of State (Berle) to Mr. Thomsen, June 20, 1940, *ibid.* /68.

The Assistant Attorney General requested in 1916 the extradition from Great Britain of Franz Rintelen, a German subject, at that time held as a prisoner of war in a detention camp near London. The American Ambassador in London reported to the Department of State:

There appears to be no precedent in this case for granting the extradition of a prisoner of war but the Foreign Office are examining the question and I shall not formally apply for extradition unless and until I receive an intimation that it will be favorably considered.

In the absence of precedent the court would probably be largely governed by the desires of the Executive Departments concerned and for my guidance in dealing with their possible objections on grounds of policy, I should like to be informed what sentence Rintelen is likely to receive if convicted and whether, in the event of his acquittal or if convicted in the event of the expiry of his sentence before the war ends, our Government would undertake to deport him to the country from which he was extradited, in this case England. The British Government would not wish to run the risk of his regaining his liberty while the war lasts.

I take it that if extradited Rintelen would be tried only for forgery in connection with the passport application, an offense which in this country would entail about six months imprisonment, and I should like to know whether our Government has other motives for desiring his presence in America, such as obtaining information from him regarding German activities in the United States and in Mexico. If this is so it might have a favorable effect on the British Government's action. In the event of Rintelen opposing extradition am I authorized to employ counsel?

The Embassy later reported:

. . . After consultation with the various Departments concerned, Foreign Office inform me that the British Government is opposed to the extradition of Rintelen. Under the circumstances there would appear to be no use in my applying formally for his extradition and I shall not do so unless instructed.

Although it is not shown by the records of the Department of State whether the formalities of extradition were observed, the American Ambassador nevertheless reported on April 18, 1917 that Rintelen, in the custody of a Scotland Yard officer, left on April 14, 1917 for New York.

The Assistant Attorney General (Wallace) to the Secretary of State (Lansing), June 12, 1916, MS. Department of State, file 241.11R47; the

Counselor for the Department of State (Polk) to the Ambassador to Great Britain (Page), no. 3820, June 27, 1916, *ibid* /1; Mr. Page to Mr. Lansing, telegram 4588, July 20, 1916, *ibid* /4; the Chargé d'Affaires ad interim in London (Laughlin) to Mr. Lansing, Aug. 26, 1916, *ibid* /7; Mr. Page to Mr. Lansing, no. 6089, Apr. 18, 1917, *ibid* /12.

The Minister of Switzerland, representing German interests in the United States, protested in 1919 against the extradition to Canada of Lieutenant Werner Horn, a German national, charged with wilfully destroying a railroad bridge in Canada. The Acting Secretary of State said in reply that—

the record of proceedings had before the Extradition Magistrate in this case shows that the demanding Government established by competent evidence that the offense with which Horn is charged was committed on Canadian territory. The record further shows that Horn did not avail himself of his opportunity to be represented in the proceedings by legal counsel, or to present testimony. The record being as set forth, the Secretary of State considered himself obligated to issue the warrant of surrender for Horn in fulfillment of treaty obligations towards the Government of Great Britain.

The Swiss Minister (Sulzer) to the Department of State, Oct. 15, 1919, and Acting Secretary Adee to Minister Sulzer, Oct. 17, 1919, MS. Department of State, file 211 42H78, 26.

JURISDICTION

§320

Extradition agreements to which the United States is a party usually contain provisions similar to article I of the extradition convention concluded on February 22, 1899 between the United States and Mexico, reading: Meaning

The Government of the United States of America and the Government of the United States of Mexico mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes and offenses specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territory of the other.

31 Stat 1818; 1 Treaties, etc. (Malloy, 1910) 1184

Section 5270 of the Revised Statutes of the United States (18 U.S.C. §651) provides for extradition "Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government", for offenses "committed within the jurisdiction of any such foreign government".

Ignacio Moran, while Mexican Consul at Berlin, was said to have embezzled funds belonging to the Mexican Government. When he was found in New Orleans a request was made for his provisional arrest and detention with a view to his extradition to Mexico. The Mexican Government took the position that as the offense was committed in the discharge of the official duties of a Mexican Consul it was beyond doubt committed within the jurisdiction of the United Mexican States within the meaning of article I of the convention of 1899 between the United States and Mexico (*ante*). The Secretary of State was of the opinion that the word *jurisdiction* as contained in the convention referred to places under the sovereign power of the contracting parties and that therefore Moran's offense was not committed within the jurisdiction of Mexico.

The Mexican Chargé d'Affaires (Téllez) to the Secretary of State (Hughes), Mar. 7, 1924, MS. Department of State, file 211.12M791/1; Mr. Hughes to the Mexican Chargé d'Affaires (Benitez), May 5, 1924, *ibid.* /7.

In 1926 the Mexican Ambassador requested the provisional arrest and detention, with a view to the extradition to Mexico, of Alfonso Casasola, who had been charged with embezzlement. The accused had been the Mexican Consul at Nogales, Arizona, and the money was said to have been taken from the consular funds. The Acting Secretary of State, after referring to article I of the convention of 1899, said:

It will be observed that the two Governments agree to deliver up persons who are charged with or convicted of crimes committed within the jurisdiction of one country and who seek an asylum or are found within the territory of the other. Furthermore, the applicable laws of the United States authorize extradition only upon complaint charging the person whose extradition is desired with having committed within the jurisdiction of the foreign Government seeking extradition any of the crimes enumerated in a treaty for extradition between the United States and the demanding State.

In view of the provisions of the Treaty quoted above and of the applicable laws of the United States on the subject of extradition, and inasmuch as it does not appear from Your Excellency's note under acknowledgement and the enclosures thereto that Alfonso Casasola is charged with committing an extraditable offense within the jurisdiction of Mexico, I do not consider that any useful purpose would be served by initiating action looking to the apprehension and detention of the accused.

Ambassador Téllez to Secretary Kellogg, Feb. 23, 1926, and the Acting Secretary of State (Grew) to Señor Téllez, Mar. 6, 1926, MS. Department of State, file 211.12C26/-.

The fact that the asylum country might, equally with the demanding government, assume jurisdiction to try the accused for the offense charged is not a sufficient ground by itself to warrant refusal by an extradition magistrate to commit the accused for the action of the authorities who are charged with the final determination of the question of surrender. The Judge of the United States District Court for the Western District of Michigan, in passing on this question in connection with the application for the extradition to Canada of Frank T. Root, stated:

Concurrent
jurisdiction

It is next urged that if an offense has been committed by this respondent the Federal courts in this state have concurrent jurisdiction with the courts of Canada to try him for that offense.

In a limited sense it is true that the courts in this country and the courts of Canada have concurrent jurisdiction in this matter. In other words, it is true that the alleged acts of the respondent constitute an offense against the laws of the United States, and also an offense against the laws of Canada. The mere fact, however, that the courts of the two countries have concurrent jurisdiction is not sufficient to warrant a refusal to extradite the respondent. No proceedings have been instituted against this respondent in this country for any offense which it is claimed he has committed against the laws of the United States. The courts of this country have not asserted their jurisdiction. On the other hand, proceedings have been instituted for his prosecution in the courts of Canada, and, in the absence of any such proceedings in this country, the mere fact that he might be prosecuted and might be tried for an offense against the laws of the United States is not sufficient to warrant a refusal to grant the warrant of extradition and to fulfill and perform treaty obligations.

Opinion of Judge Sessions, Record of Proceedings, Nov. 24, 1911, MS. Department of State, file 211 42R67/11.

Millard K. Davis sought to resist extradition to Mexico on the ground that while the stabbing for which he was responsible occurred in Mexico the death of the victim occurred in California, thus giving to California concurrent, if not exclusive, jurisdiction of the offense, thereby defeating the jurisdiction of Mexico, which Davis asserted was required by the convention to be exclusive in order to warrant surrender. The United States Circuit Court of Appeals for the Ninth Circuit, in denying the contention, said:

Act started in
one country
and completed
in another

At this point, in view of our conclusion as to the final disposition of this matter, we will consider one of the main contentions of the petitioner that, inasmuch as the stabbing occurred in Mexico and the death of the victim occurred in California, the petitioner should be tried in California and not in Mexico, for the reason that the phrase "within the jurisdiction" contained in the treaty for extradition means "exclusive jurisdic-

tion," and California has concurrent, if not exclusive, jurisdiction of the offense under section 778 of the Penal Code of California. In support of this contention, appellant cites an English case in which the court declined to surrender for extradition a person who could be tried as well within its jurisdiction. In *re Tivnan*, 122 Eng. Rep. Reprint, 971. The theory of the petitioner is that the crime of murder or manslaughter is not complete until the death of the wounded person, and that therefore, as the death occurred in California, the offense of murder was completed in California and not in Mexico, and should be tried there. We do not agree with this conclusion. So far as the petitioner is concerned, his offense was completed at the time the fatal blow was struck. He did nothing thereafter to cause the death of the victim. We think that the crime of murder so committed comes within the extradition treaty which provides for the extradition of persons committing the crime of murder "within the jurisdiction of the Republic of Mexico," and that he should therefore be surrendered for trial notwithstanding the possibility that he might also be tried for murder under the laws of the State of California.

Ex parte Davis, 54 F. (2d) 723, 727 (1932).

Domestic vessels

A person committing a crime aboard an American vessel while in the territorial waters of a foreign state and returning to the United States thereafter, has been held to be a fugitive from the justice of such foreign state and subject to be proceeded against under an applicable treaty and the extradition laws of the United States. Judge Sessions of the District Court of the United States for the Western District of Michigan, sitting as an extradition magistrate in the matter of the application of the Government of Canada for the extradition of Frank T. Root, stated:

It is true that the decks of a vessel of the United States, wherever it may be, whether in domestic or foreign waters, constructively are a part of the territory of the United States, and to such an extent as to give the courts of the United States jurisdiction to try any person committing an offense thereon. It cannot be said, however, that an American vessel located in foreign waters, and particularly within a marine league of the shore, is such a part of the territory of the United States as to give the courts of the United States exclusive jurisdiction of crimes committed thereon. The courts of the country within whose territory a crime is committed usually have jurisdiction to try and punish the person committing such crime. While, constructively this respondent may have been in the territory of the United States at the time this offense is alleged to have been committed, because of the fact that he was upon a vessel of the United States, yet actually and corporeally he was within the territory of Canada, and no proceedings having been instituted in the courts of the United States to prosecute him for an offense alleged to have been committed against the laws of the United States, he was

sufficiently within the territory of Canada to make him a fugitive from the justice of Canada.

It follows, necessarily, from the views expressed that it becomes my duty to hold that the respondent is subject to extradition, and to make the necessary certificate that the proper steps may be taken by the proper authorities for the surrender of the respondent according to the stipulations of the treaty between the United States and Great Britain.

Opinion of Judge Sessions, Record of Proceedings, Nov. 24, 1911, MS. Department of State, file 211.42R67/11.

Merchant vessels on the high seas and ships of war everywhere are constructively regarded as a part of the nation to which they belong, and consequently criminal offenses committed upon them are considered as having been committed within the jurisdiction of such nation.

The Under Secretary of State (Grew) to the Ambassador to Germany (Schurman), Jan. 28, 1927, MS. Department of State, file 211.62/46.

The Department of State is without authority of law to direct the captain of an American steamship to arrest and detain aboard his ship, pending its return to the United States, a person charged in the United States with a crime.

Detention
on vessel

The Secretary of State (Hughes) to the Governor of New York (Miller), telegram of Aug. 8, 1921, MS. Department of State, file 211.11B27/-.

Pursuant to a request made on September 10, 1919 for the extradition from the United States of Titus Richards, a British subject who had stabbed a Norwegian shipmate aboard a Norwegian ship while on the high seas, the Acting Secretary of State, in a note dated September 19, 1919 to the Minister of Norway, enclosed a warrant for the surrender of Richards.

Foreign
vessel

Acting Secretary Phillips to Minister Bryn, Sept. 19, 1919, MS. Department of State, file 211.57R39/1.

The Chargé d'Affaires ad interim of Sweden, in a note dated August 31, 1928, informed the Acting Secretary of State of the receipt of information from the Swedish Consul General in New York to the effect that a member of the crew of the Swedish vessel *Liguria*, a Brazilian named Francisco de Lima, had struck another member, a Norwegian subject named Monsen, while on the high seas; that when the vessel reached New York the injured man was taken to a hospital, where he died; and that a preliminary hearing had been held before a grand jury in Brooklyn. The Department of Justice subsequently

informed the Secretary of State of the receipt of a telegram from the United States attorney at Brooklyn, reading:

Grand Jury did not indict Francesco Lima for murder Monesen thirty miles out to sea on Swedish vessel Liguria account lack jurisdiction. Holding Prisoner pending extradition papers through Swedish Ambassador and your office. Lima is Brazilian Monesen Norwegian. Sweden has jurisdiction. We could hold him against Habeas Corpus on ground he is alien seaman who will abandon calling. Extradition should be rushed.

Later, the Department of State received from the Swedish Legation a purported copy of testimony taken before the United States commissioner at Brooklyn in the matter of the application for the extradition of the accused to Sweden. The Department thereupon requested the Commissioner to forward the record of the proceedings. The Commissioner replied:

This proceeding was brought on by the Swedish Consul for the purpose of extraditing one Lima De Francisco for an alleged assault on the high seas on one of their Subjects who subsequently died as a result of the assault.

The evidence shows that the defendant was a native of Brazil and that the party on whom the assault was committed was a subject of the Kingdom of Sweden. The boat on which the assault was committed was of Swedish registry. The place where the alleged assault was committed was 35 miles from the Nantucket Lightship, hence not within the territorial waters of our country.

As you can readily see from the brief statement of the facts, . . . the United States has not jurisdiction to order the extradition of De Lima but I think that the Swedish authorities have not lost jurisdiction due to the fact that they surrendered him to the police of this City, and I based my findings on the fact that the Treaty between the United States and Sweden does not govern this case, but only in cases where the culprit is a fugitive from justice or that a warrant for his apprehension has been forwarded from the Swedish authorities.

The Swedish Chargé d'Affaires (Assarsson) to the Acting Secretary of State (Castle), Aug. 31, 1928, MS. Department of State, file 211.58 Lima, Francisco/1; the Acting Secretary of State (Clark) to the Attorney General (Stone), Sept. 4, 1928, *ibid.* /4; the Assistant Attorney General (Lubring) to the Secretary of State (Kellogg), Sept. 4, 1928, *ibid.* /3; Mr. Kellogg to Commissioner Wilson, telegram of Oct. 22, 1928, *ibid.* /9; Mr. Wilson to Mr. Kellogg, Nov. 3, 1928, *ibid.* /14. The Department informed the Swedish Minister that it did not agree with the Commissioner and suggested rearrest of De Lima. The suggestion was not followed and De Lima was deported to Brazil.

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The Department does not perceive that any provisions of treaties between the United States and Italy constitute an obstacle to the arrest on board an Italian ship in a port of the

United States of a person [Charles Ponzi] charged with an offense against the laws of this country. Moreover, the Department would not be disposed to act upon an allegation of a violation of an Italian treaty unless the matter were brought to its attention by the Italian Government through its diplomatic representatives at this capital.

Secretary Kellogg to Senator Sheppard, July 12, 1926, MS. Department of State, file 200.11P77/1.

The evidence shows that the relator has been convicted in Italy of the crime alleged, and has not served the sentence imposed, for the reason that the relator could not be located in Italy. Fugitives
from justice

It seems to be clear that the relator has fled his country to escape punishment for his criminal acts, and he is therefore a fugitive from justice.

United States ex rel. di Stefano v. Moore, United States Marshal, et al., 46 F. (2d) 308, 310 (D.C., E.D.N.Y., 1930); affirmed, 46 F. (2d) 310 (C.C.A. 2d, 1930).

Boyd Hammond, while in Chicago, instructed his secretary in Los Angeles to draw a draft on the Regal Petroleum Company at Calgary, Canada. The draft was deposited in the Western National Bank at Los Angeles to Hammond's credit. It was forwarded to Calgary by the correspondents of the Western National Bank, where it was presented to and paid by the Bank of Montreal and charged to the account of the Regal Petroleum Company. The Canadian Government charged Hammond with the crime of obtaining money by false pretenses and requested his extradition. Following his commitment by the United States commissioner at Los Angeles the accused petitioned the United States District Court for a writ of *habeas corpus*, which was denied. An appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit, the accused setting up among other grounds that he was not a fugitive from the justice of the demanding government or a person within the meaning of article X of the treaty of 1842 with Great Britain or of its supplements and amendments. After quoting article X of the treaty, the Circuit Court of Appeals said:

This treaty clearly applies to any person within the jurisdiction of either nation who has committed an extraditable offense within the jurisdiction of the other. Appellant contends that this clear and definite language should be construed to apply only to fugitives because that term is used in title and preamble of the treaty and in the proclamation, announcing that the treaty is in effect. The treaty applies according to its terms to both those who "shall seek an asylum," and to those who "shall be found," therein. We see no reason for limiting the plain provisions of the statute. The Supreme Court in the decision from which we

have quoted (*Ford v. U.S.*, 273 U.S. 593, 47 S. Ct. 531, 71 L. Ed. 793, *supra*) shows the desirability of surrendering a person for trial who puts in motion forces which operate to consummate a crime within the territory of the demanding nation (see, also, *Palliser v. U.S.*, 136 U.S. 267, 10 S. Ct. 1034, 34 L. Ed. 514; *Benson v. Henkel*, 198 U.S. 1, 25 S. Ct. 569, 49 L. Ed. 919), and there is no reason to suppose that the treaty was intended to exclude such a class of offenders; on the contrary, the treaty expressly agrees to surrender them.

Ex parte Hammond, 59 F. (2d) 683, 686 (1932).

ACCUSATION OR WARRANT OF ARREST

§321

The surrender of an alleged fugitive to a foreign government is dependent, in the United States, upon the filing of an accusation against him in the foreign jurisdiction, charging an offense specified in the treaty of extradition. The United States Circuit Court of Appeals for the Ninth Circuit said:

... While it is uniformly held that a government may surrender a fugitive from justice for trial notwithstanding the absence of an extradition treaty, the powers of the Secretary of State are defined by statute (18 USCA §653; *Moore on Extradition*, §43). He is authorized to order the person committed to be delivered in the name and behalf of such foreign government "to be tried for the crime of which such person shall be accused." It is further provided: "And such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory . . . of such foreign government, pursuant to such treaty." The statute limits the authority of the person executing the order "to take him to the territory of such foreign government, pursuant to such treaty." It appears, therefore, that, while the action of the commissioner may be taken in advance of any charge filed in the Mexican courts, the right to deliver him for trial depends upon the filing of an accusation in the foreign jurisdiction, and that accusation must be an offense defined in the treaty. See, upon this point, *Powell v. United States* (C.C.A.) 206 F. 400; *United States v. Greene* (C.C.A.) 146 F. 766; *In re Grin* (C.C.) 112 F. 790; *Id.*, 187 U.S. 181, 23 S. Ct. 98, 47 L. Ed. 130; *In re Sheazle*, 21 Fed. Cas. 1214, No. 12734; *State v. Rowe*, 104 Iowa 323, 73 N.W. 833.

Ex parte Davis, 54 F. (2d) 723, 727 (1932).

In order that provisional detention and extradition may be demanded, it must be stated that a warrant has been issued in Connecticut for arrest of fugitive, and the crime for which he is wanted must be enumerated in treaty.

The Secretary of State (Root) to the Governor of Connecticut (Woodruff), telegram of June 6, 1907, MS. Department of State, file 5485/3.

The Governor of New Jersey requested on December 27, 1906 that Isadore Levy at London, Canada, be held to await extradition papers from New Jersey, where he was charged with larceny. On the same date the Secretary of State inquired whether a warrant of arrest had been issued. When the executive clerk of New Jersey replied that no warrant had been issued, the Secretary of State informed the Governor that the Department of State could not request the extradition of Levy until advised that a warrant had been issued. It was added that this statement must be made in every extradition case in which the Department is called upon by State authorities to request the return of criminals who have fled to foreign countries. Finally it was stated that upon notification that a warrant had been issued the Department would request the provisional arrest and detention of the accused pending the receipt of formal papers.

Governor Stokes to Secretary Root, Dec 27, 1906, and Mr. Root to Mr. Stokes, Dec. 27, 1906, MS. Department of State, file 3443; the executive clerk of New Jersey (Fox) to Mr. Root, Dec 27, 1906, and Mr. Root to Mr. Stokes, Dec 28, 1906, *ibid* 3443/1.

The American Ambassador in London informed the Secretary of State that the police authorities there had been requested by the police authorities of New York to arrest August Ots, charged with murder. The accused apparently was aboard a steamer bound for Finland. The Ambassador inquired whether extradition was desired. The information was communicated to the Governor of New York, who replied that an application would be made for extradition. The Embassy was instructed accordingly. The Ambassador replied:

Warrant cannot be granted here until Embassy can assure magistrate that warrant has been issued in United States on charge of murder, and that Ots suspected of being in England.

Ambassador Reid to Secretary Knox, telegram of Feb. 13, 1910, and Mr. Knox to Governor Hughes, telegram of Feb. 14, 1910, MS. Department of State, file 23518; Mr. Hughes to Mr. Knox, telegram of Feb. 15, 1910, and Mr. Knox to Mr. Reid, telegram of Feb. 16, 1910, *ibid*. 23518/1; Mr. Reid to Mr. Knox, telegram of Feb. 17, 1910, *ibid*. /2.

PROCEDURE

REQUISITIONS

§322

It is settled in the United States that a fugitive from the justice of a foreign country may be surrendered only after the receipt of a requi-

sition therefor through diplomatic channels. This may be said to result from the fact that the statutory laws provide for surrender only pursuant to treaty, and the treaties provide for such a requisition. When proceedings are to be instituted under a treaty with a view to the return of a fugitive to the United States, action by the Secretary of State will be taken only after the receipt of a request from the Attorney General of the United States, when a Federal offense is involved, or from the Governor of a State or Territory or from the Chief Justice of the District Court of the United States for the District of Columbia, when the offense charged is a crime under the laws of the respective jurisdiction. Requisition should not be confused with the action taken to effect the provisional arrest and detention with a view to the extradition of the accused, which is dealt with *post*, p. 103.

The record has not yet been received by the Department, nor is there on file with the Department a request of the British Embassy on behalf of the Canadian Government for Mr. Drew's surrender. The Department would not be justified in issuing the warrant of surrender unless so requested by the British Embassy.

The Second Assistant Secretary of State (Adee) to E. R. Mason, May 23, 1921, MS. Department of State, file 211.42D82/-.

Request
required

Major General Hugh L. Scott, Chief of Staff, War Department, enclosed with a letter to the Secretary of State a copy of a telegram dated August 29, 1915 from General Francisco Villa requesting the surrender of Pedro Mendosa, who, it was stated, had stolen General Villa's automobile and fled to the United States. The Department of State replied that it would not be in a position to consider the matter unless the case were presented to it in the course of appropriate extradition proceedings.

Major General Hugh L. Scott to Secretary Lansing, Aug. 31, 1915, and the Second Assistant Secretary of State (Adee) to Major General Scott, Sept. 10, 1915, MS. Department of State, file 211.12M521.

Proceeding
under
statute

The rule is well settled that, unless there is a provision in the treaty, a demand by one country upon another for the extradition of an alleged fugitive is not a step necessary to be taken prior to, or to be proven in, the proceedings before the extradition commissioner, pursuant to section 5270, R.S. U.S. Likewise, unless treaty stipulations require another or a different course to be pursued, the foreign country is authorized to institute the proceedings under the section named without any precedent formalities. Some confusion has arisen because of a failure to distinguish between cases where the treaty contains stipulations respecting procedure and cases where it is silent, leaving, in the latter case, the statute as the controlling guide in matters before the extradition magistrate.

Ex parte Schorer, 197 Fed. 67, 69 (D.C., E.D. Wis., 1912).

Maurice Léon, as attorney for the French Government, wrote to the Secretary of State, stating that he had made application on August 12, 1907 to the United States commissioner at Boston for the extradition of Louis Joseph Vercomste, alias Louis Blondel, a fugitive from the justice of France, and inquired when "the requisition for the extradition of this fugitive will be issued, and to whom it will be forwarded". The Acting Secretary replied:

As the Department can recognize only the regular diplomatic channel in cases of extradition, inquiry has been made of the French Embassy as to whether extradition is desired.

Upon the receipt of a request on August 20 from the French Embassy, the warrant of surrender was sent directly to the French Consul General at New York.

Maurice Léon to Secretary Root, Aug. 15, 1907, MS. Department of State, file 8088; Acting Secretary Adee to Mr. Léon, Aug. 20, 1907, *ibid.* 8088/1; the French Chargé d'Affaires (Des Portes) to Mr. Root, telegram of Aug. 20, 1907, and Mr. Adee to the French Consul General (Lanel), *ibid.* /3.

There are no prescribed forms upon which applications for the extradition from foreign countries to the United States of fugitives from justice must be made. Certain requirements must, however, be observed when requesting the Secretary of State to initiate proceedings in foreign countries. The application and its accompanying documents should be presented in duplicate. One set is required for the files of the Department and one set, duly authenticated, is transmitted to the American diplomatic or consular representative in the country of refuge to be placed before an extradition magistrate. The application must show that one of the offenses enumerated in the treaty between the United States and the country from which extradition is sought has been committed within the jurisdiction of the United States and that the person charged therewith is believed to have sought asylum or has been found within that country.

Applica-
tions for
requisition

If the person whose extradition is desired has been convicted of an offense specified in the treaty and has escaped thereafter, it ordinarily is sufficient if the application is accompanied by a duly authenticated copy of the record of conviction and sentence of the court. If, however, the alleged fugitive is merely charged with an offense, the application should be accompanied by a duly authenticated copy of the indictment or information, if any, and of the warrant of arrest and return thereto, together with a copy of the evidence upon which the indictment was found or the warrant of arrest was issued, or by original affidavits or depositions setting forth as fully as pos-

sible the circumstances of the crime. An indictment, information, or warrant of arrest alone, without the accompanying proofs, is not sufficient. The proofs furnished should make out as strong a case as possible in order to meet the contingencies of the local requirements at the place of arrest.

If the extradition of the fugitive is sought for several offenses, copies of the several convictions, indictments or informations, and warrants of arrest, and copies of the documents in support of each, should be furnished.

An application for the extradition of a fugitive should state his full name, if known, and his alias or aliases, if any, and should designate the offense or offenses charged in the language of the treaty. It should contain a statement to the effect that it is made solely for the purpose of bringing about the trial and punishment of the fugitive and not for any private purpose and that, if the application is granted, the criminal proceedings will not be used for any private purpose.

Copies of all papers constituting the evidence, including the record of conviction, the indictment or information, and the warrant of arrest, must be duly certified by an officer empowered to make such a certification and authenticated under the great seal of the State or the seal of the Department of Justice, as the case may be, depending upon the origin of the application.

While it is the usual practice to include in the application the nomination of a person for designation by the President to receive and convey the fugitive to the United States, this, although desirable in order to avoid subsequent correspondence, is not an absolute requirement.

When extradition is sought for an offense within the jurisdiction of State or Territorial courts, the application must be made by the Governor of the State or Territory. When the offense is against the United States, the application must be made by the Attorney General. Applications for the extradition of fugitives from the justice of the District of Columbia must be made by the Chief Justice of the District Court of the United States for the District of Columbia.

"Only one set of certificates of the Secretary of State of Texas certifying to the official character of the county officers acting in the case was transmitted to the Department, and these certificates were not attached to either set of extradition papers. The Department has inserted them in their proper places in the set which is to go forward to Mexico; but the Department would be obliged if this could be done, in future applications for extradition, by the state authorities having charge of the case. It will also be necessary that whatever authentications are requisite should be furnished in duplicate in the same manner as the rest of the papers, so that the set which the Department retains for its files may be an exact duplicate of the set which is forwarded to the foreign country to serve as a basis of the extradition proceedings." The Governor of Texas (Campbell) to the Secretary of State

(Root), May 10, 1907, MS Department of State, file 6464; the Acting Secretary of State (Bacon) to Mr. Campbell, June 1, 1907, *ibid.* 6464/2-7.

. . . Requisitions for surrender of fugitives are addressed to the executive, not the judicial, branch of the government.

President of the United States ex rel. Caputo v. Kelly, United States Marshal, et al., 92 F. (2d) 603, 604 (C.C.A. 2d, 1937).

In 1909 the Governor of Tennessee requested the provisional arrest and detention with a view to extradition from Jamaica of Foy W. Dulaney, charged in Tennessee with embezzlement. He later made a formal request for extradition. The request was accompanied by a copy of the charge against Dulaney and a copy of the warrant of arrest. In replying on August 3, the Assistant Secretary of State said:

I beg to return the State warrant enclosed with your letter as the application is wholly insufficient to serve as the basis for action by this Department.

For your information I enclose several circulars issued by this Department on extradition in general and on extradition from British dominions.

In order that the President's warrant may issue in the case there should be forwarded hither a set of papers made out in duplicate, so that one set may be retained for the files of this Department and the other transmitted under the seal of the Department for the use of the Agent who may be designated to receive and bring back the fugitive. The papers should contain:

1. A formal application by the Governor on the Department of State stating the crime for which the surrender is demanded, and requesting that the extradition be asked for and nominating an agent to bring back the fugitive;
2. A certified copy of the warrant of arrest and a copy of the complaint upon which that warrant was issued;
3. Evidence in the form of depositions sufficient to make out a prima facie case against the fugitive; and
4. Certain assurances given by the Governor, as set forth in one of the enclosed circulars, concerning the object for which the extradition is sought.

All the papers should be properly authenticated. The authority of the official taking the depositions should be certified to by the clerk of the proper court and the latter's official capacity should then be properly attested under the seal of the State, or by the official whose duty it is to make such attestation, and so on until finally the seal of the State is affixed. The same course should be adopted with respect to the other essential papers, as for instance, the warrant of arrest. Where several papers are all attested by the same officer, a single authentication of his capacity is sufficient if it be specific enough to cover all of the papers he attests.

Governor Patterson to Acting Secretary Wilson, telegram of July 26, 1909, MS Department of State, file 20732/1; Mr. Patterson to Secretary Knox, July 31, 1909, and Mr. Wilson to Mr. Patterson, Aug 3, 1909, *ibid* /3-4.

**Frontier
states**

An exception to the rule that requisitions for the surrender of alleged fugitives from justice must be made through diplomatic channels is found in article IX of the extradition convention concluded on February 22, 1899 between the United States and Mexico. It is provided therein as follows:

In the case of crimes or offenses committed or charged to have been committed in the frontier states or territories of the two contracting parties, requisitions may be made either, through their respective diplomatic or consular agents as aforesaid, or through the chief civil authority of the respective state or territory, or through such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be duly authorized by the said chief civil authority of the said frontier states or territories, or when, from any cause, the civil authority of such state or territory shall be suspended, through the chief military officer in command of such state or territory.

31 Stat. 1818, 1824; 1 Treaties, etc (Malloy, 1910) 1184, 1188

The Chargé d'Affaires ad interim of Mexico, in a note dated October 24, 1906, requested the provisional detention with a view to extradition to Mexico of Juan José Arredondo and 64 other persons charged with having committed on September 26 and September 27, 1906 at Villa Jimenez, State of Coahuila, the crimes of robbery, assault, and murder. The Chargé stated:

My Government advises me, at the same time, that, conformably to Article IX of the treaty for the extradition of criminals in force between Mexico and the United States, the Governor of the State of Coahuila will, in good time, present a formal requisition for the extradition of the offenders herein named to the Governor of the State of Texas.

In transmitting the note to the Attorney General, the Acting Secretary of State said:

It would appear from the Embassy's note that the only action which it is desired to have taken by the United States authorities is to secure the provisional arrest and detention of the fugitives. It seems to be the intention of the Mexican authorities to adopt the procedure followed in border-state cases after the fugitives have once been placed in custody.

The formal extradition of the accused was requested in a note dated November 19, 1906 addressed to the Department of State, which replied:

In your note of the 24th ultimo it was stated, with reference to these cases, that the Governor of Coahuila would make a requisition upon the Governor of Texas for the extradition of the fugitives, thereby adopting the procedure which may be followed in frontier-state cases as outlined in Article IX of the extradition treaty in force between the United States and Mexico.

The Department notes that you now make a requisition for the same purpose, but addressed in the usual manner to the Federal Executive, which contemplates a procedure entirely through Federal channels in accordance with the provisions of Article VIII of the treaty and the other articles applicable thereto.

In other words, as the case now stands, it would seem that two methods are being pursued to obtain the same end, which are exclusive of each other, when either one of them would be sufficient.

As long as the application upon the Governor of Texas to obtain this extradition is existent, the Department would hesitate to attempt to oust his jurisdiction, when the object in view can be accomplished in an entirely proper way by withdrawal of the original application by the Governor of Coahuila. This Department has had no information of such a withdrawal, but upon receipt thereof it will give the matter immediate attention.

The Chargé d'Affaires replied that—

the Governor of Coahuila has receded from his demand and acquainted the Governor of Texas with this decision, and as, under the circumstances, it is urgent to proceed with the case, my Government would be extremely obliged if the Government of the United States were pleased, in the absence of any objection thereto, to issue the requisite orders by telegraph.

The Department transmitted such a requisition to the Attorney General of the United States for appropriate action and so informed the Governor of Texas.

The Mexican Chargé d'Affaires (Dávalos) to the Secretary of State (Root), no. 220, Oct. 24, 1906, and the Acting Secretary of State (Bacon) to the Attorney General (Moody), Oct. 25, 1906, MS. Department of State, file 1818; Señor Dávalos to Mr. Root, no. 243, Nov. 19, 1906, and Mr. Bacon to Señor Dávalos, no. 133, Nov. 21, 1906, *ibid.* 1818/4; Señor Dávalos to Mr. Root, no. 249, Nov. 21, 1906, and Mr. Bacon to the Governor of Texas (Latham), Nov. 21, 1906, *ibid.* /5

Notwithstanding the apparently clear provision of article IX of the treaty, *ante*, the Mexican authorities have been inclined to give to it a slightly restricted interpretation.

The Governor of the Territory of Arizona requested on October 8, 1907, through the Secretary of the Interior, the extradition from Mexico of Rafael Valenzuela and Antonio Diaz. Although the accused were arrested at the direction of the Governor of the State of Sonora, he desired, in view of the requirements of the Mexican Government, that a formal request be made through diplomatic channels. The Acting

Secretary of State, in an instruction dated October 10, 1907 to the Ambassador at Mexico City, stated:

Since the extraditions contemplated were between Sonora and Arizona, both of which border upon the frontier, the Department would naturally suppose that the provisions of article 10 of the treaty of extradition of 1899 might be invoked so far as applicable, and it would be glad to have you inquire of the Mexican Minister of Foreign Affairs whether the statement of the Governor, as above quoted in the letter of the Secretary of the Interior, sets forth the attitude of the Mexican Government in this regard.

The Ambassador replied:

It seems to me that the Governor of Arizona has misunderstood the spirit of this apparently new departure of the Mexican Government in extradition cases between border states, the object of which is to enforce the exact terms of the treaty. The only thing the Mexican Government desires is that while the Governor of Arizona, for example, may ask the Governor of Sonora to hold a certain fugitive from justice, he must make the formal request for the provisional arrest and detention through the diplomatic channels. All other proceedings, such as the submission of proofs and other documents relative to the extradition may be sent from one Governor direct to the other, but, as stated above, the request for provisional arrest and detention must be made through the proper chancelleries. This, of course, does not prevent the Governors of our States bordering on the Mexican frontier from asking their colleagues on the Mexican side to take a fugitive under custody, but in making such request it would be well for them to state at the same time that they have asked for the provisional arrest and detention of the fugitive through the diplomatic channels. This will avoid any future confusion in a matter which, it seems to me, the Department has already settled.

The Secretary of the Interior (Garfield) to the Secretary of State (Root), Oct. 8, 1907, MS. Department of State, file 8960; Acting Secretary Adee to Ambassador Thompson, Oct. 10, 1907, *ibid.* 8960/1; Mr. Thompson to Mr. Root, Oct. 21, 1907, *ibid.* /7.

In a letter addressed by the Secretary of State (Hull) to the Governor of Texas under date of March 12, 1941, in reply to an inquiry by the Governor as to his authority and the procedure to be followed by him in connection with a request made by the Governor of the State of Tamaulipas for the extradition of a fugitive from the latter state, it was explained:

In view of the fact that this matter has been taken up directly with you by the Governor of the State of Tamaulipas, it would seem that the latter has elected to proceed under Article IX [of the extradition convention of 1899 quoted *ante*]. You would be warranted, therefore, in instructing the Attorney General of Texas or the local District Attorney (assuming that you have authority

so to instruct the District Attorney) to make complaint on information and belief before a judge of a court of record of general jurisdiction in Texas and to cause a warrant to be issued for the arrest of the accused.

Following the arrest, the Governor of Tamaulipas should be notified thereof and reminded that by Article X of the Extradition Treaty mentioned previously, forty days after arrest are allowed for the production of extradition papers which should make out a prima facie case of guilt and bear a certificate by the principal diplomatic officer of the United States in Mexico or by the principal consular officer of the United States in the appropriate Mexican district (in this case presumably Matamoros) to the effect that the papers are so authenticated as to entitle them to be received for similar purposes in courts in Mexico. (See U.S.C. Title 18, section 655)

When received, the papers should be placed before the judge in Texas who issued the warrant of arrest and who should conduct the hearing in the case. The Attorney General of Texas or the local District Attorney should appear in support of the request of Mexico for the extradition of the accused.

If the judge finds that a prima facie case has been made out he should hold the accused to await my action and should forward promptly to me the record of the proceedings had before him. (See U.S.C., Title 18, section 651.)

The Secretary of State (Hull) to the Governor of Texas (O'Daniel), Mar. 12, 1941, MS. Department of State, file 211.12 Leal, Esteban Rivera/2.

The Governor of Texas transmitted on October 10, 1939 to the Secretary of State a copy of a telegram from the Governor of the State of Tamaulipas, Mexico, requesting the detention of Juan Delgado Ortiz under articles IX and X of the extradition convention of 1899. The Governor of Texas stated that it was his understanding that extradition from Texas to Mexico came within the jurisdiction of the Federal Government. The Secretary of State called his attention to article IX of the convention, which contemplates the arrest of fugitives by the chief civil authority of a border State upon the request of such an authority in a border State of the other country, examination by the proper judicial authority, and, so far as concerns the United States, the forwarding of the record of such examination to the Secretary of State for final action.

The record of the proceedings before the judge of the court in Cameron County, Texas, was forwarded to the Secretary of State by the Governor of Texas on November 16, 1939, whereupon the Mexican Ambassador was requested to inform the Secretary of State whether the extradition of Ortiz was desired by Mexico. The Mexican Ambassador thereupon made a formal request, and the warrant of surrender was forwarded to him on December 12, 1939.

The Governor of Texas (O'Daniel) to the Secretary of State (Hull), Oct. 10, 1939, MS. Department of State, file 211.12 Ortiz, Juan Delgado/1; Mr. Hull to Mr. O'Daniel, telegram of Oct. 12, 1939, *ibid.* /2; Mr. O'Daniel to Mr. Hull, Nov. 16, 1939, *ibid.* /10; the Counselor of the Department of State (Moore) to the Mexican Ambassador (Nájera), Nov. 29, 1939, *ibid.* /12; Señor Nájera to Mr. Hull, Dec. 7, 1939, *ibid.* /13; Mr. Moore to Señor Nájera, Dec. 12, 1939, *ibid.* /16.

Requests
through
American
consuls

The American Consul at Puerto Castilla, Honduras, informed the Secretary of State of the desire of the "Judge of Truxillo" for the detention of Desiderio Lopez Ruyales, who was charged in Honduras with fraud and who was then in New Orleans. Although the matter of the detention of the accused was taken up informally with the immigration authorities and such detention was effected, the Consulate was instructed that it might inform the judge that, if the Honduran Government desired to bring about the provisional arrest and detention of the fugitive with a view to his extradition, appropriate instructions should be sent by the Government to the Honduran Legation in Washington.

The Consul at Puerto Castilla (Haines) to the Secretary of State (Stimson), telegram of Sept. 3, 1931; the Acting Secretary of State (Rogers) to Mr. Haines, telegram of Septem 5, 1931; the Assistant Secretary of State (White) to Mr. Haines, Sept. 30, 1931 · MS Department of State, file 811.111 Ruyales.

See also the Assistant Secretary of State (White) to the Honduran Minister (Dávila), Nov. 7, 1931, MS. Department of State, file 211.15 Ruyales, Desiderio Lopez/2.

The secretary to the Governor of Florida transmitted, on June 30, 1909, to the Department of State an application by the Governor for a requisition upon the Government of Mexico for the surrender of Grover C. Varn, to which the Department replied:

Treaty offense

. . . These papers are insufficient in several particulars.

In the first place the requisition for the extradition of the fugitive should state a crime for which the surrender is demanded that is made extraditable by extradition treaty with the country from which extradition is desired. The application forwarded by you charges one crime, while the copy of the indictment furnished shows that it was obtained on the charge of another crime. Neither of these crimes is specified in our extradition treaty with Mexico, a copy of which is enclosed herewith.

The secretary of the Governor of Florida (Whitfield) to the Secretary of State (Knox), June 30, 1909, and the Acting Secretary of State (Wilson) to Mr. Whitfield, July 3, 1909, MS Department of State, file 20401/-1.

"The papers submitted by you are returned herewith, with the statement that in order to obtain the extradition of the fugitive it is necessary to enumerate a crime which is included in the extradition treaty between the United States and the country whither the fugitive has fled. The Governor's application states that the fugitive in this case is charged with a misdemeanor under the laws of the State of Pennsylvania. It will be necessary, therefore, to specify some particular offense made extraditable by treaty in order to obtain the return of this man." The Acting Secretary of State (Bacon) to the district attorney of Allegheny County, Pa (Goehring), Apr. 18, 1908, MS. Department of State, file 13111/-1.

The Secretary of State of Illinois, at the direction of the Governor, transmitted to the Department of State a requisition, with accompanying papers, for the extradition from Mexico of a fugitive charged in Illinois with embezzlement. The Acting Secretary of State replied:

The Department fears that the evidence submitted may not be sufficient to take the case out of the following prohibition of Article 3 of the treaty of extradition between the United States and Mexico, concluded February 22, 1899:

"Extradition shall not take place in any of the following cases: When the evidence of criminality presented by the demanding party would not justify, according to the laws of the place where the fugitive or person so charged shall be found, his or her apprehension and commitment for trial, if the crime or offense had been there committed."

It is therefore suggested by the Department that further evidence be supplied on the question of the disposition of the proceeds of the drafts which are said to have been cashed by the fugitive. On this point, it would seem that evidence should be submitted to show how it is known that these drafts were cashed by Smith, and that a copy of the letter which it is said Smith wrote acknowledging the receipt of the drafts, should be furnished.

The Secretary of State of Illinois (Rose) to the Secretary of State (Knox), Mar. 27, 1909, and the Acting Secretary of State (Wilson) to Mr. Rose, Mar. 30, 1909, MS. Department of State, file 18260/10-11.

The Governor of Washington requested the extradition from Canada of G. R. Estep, charged in the State of Washington with horse-stealing. The Department of State informed the Governor as follows:

The papers are returned herewith, inasmuch as it does not appear that they make out a sufficiently strong *prima facie* case of the guilt of the fugitive to render his return to the jurisdiction of the United States reasonably sure.

It is suggested that the evidence of the witness John Baze should be more circumstantial, giving in detail the proceedings of himself and the fugitive leading up to the taking of the horse and describing the animal so as to identify it with the one which was found missing from the stable of Mr. Chavis. It is further noted that this affidavit does not give the year of the taking of the horse and this omission should be supplied. It would be well also if other corroborative evidence of the stealing could be furnished, possibly in the form of a deposition from the man Peters, referred to in the affidavit of Mr. Baze.

Governor Hay to Secretary Knox, Oct. 18, 1909, and Acting Secretary Wilson to Mr. Hay, Oct. 27, 1909, MS. Department of State, file 22036.

The Secretary of War, acting upon a request from the Governor of Puerto Rico, requested the extradition from Cuba of Juan Valdes Gonzalez, who had been convicted in Puerto Rico of forgery. In

returning the documents to the Secretary of War, the Secretary of State informed him that—

. . . If the authorities of Porto Rico wish to bring the fugitive to punishment for more than one crime of forgery the papers furnished should cover all the separate crimes for which it is intended to punish the fugitive on his delivery in Porto Rico.

The Secretary of War (Dickinson) to the Secretary of State (Knox), Nov. 26, 1909, and Mr. Knox to Mr. Dickinson, Dec. 6, 1909, MS. Department of State, file 21018/5.

Preliminary requisition

It is not necessary in order to give jurisdiction to a United States commissioner in extradition proceedings that a demand for extradition be made by the foreign government concerned prior to the institution of the proceedings before the commissioner.

Ex parte Zentner, 188 Fed. 344, 347 (D.C., D. Mass., 1910).

Porter Charlton, whose extradition was requested by the Government of Italy, sought to defeat surrender on the ground that no formal demand for his extradition was made within 40 days after his arrest, as provided in article II of the supplemental extradition convention of 1884 between the United States and Italy. 1 Treaties, etc. (Malloy, 1910) 985, 986; 24 Stat. 1001, 1002. The Supreme Court of the United States, in passing on the question, stated:

A "certificate," such as was indicated by that convention, was undoubtedly "exhibited" to the committing magistrate, and was the basis of his action. The other parts of the provision are not clear. What is referred to by the phrase, "the requisition, together with the documents above provided," etc., which is required to be made within forty days, or the person set at liberty? The "certificate" attesting "that a requisition has been made," etc., was "exhibited" to Judge Blair; and we fail to find in this clause of the treaty any requirement that the subsequent "formal demand" for the extradition shall be filed with the magistrate within forty days after the arrest of the accused, or at any other time. The whole of the convention should be read together and in connection with §5270, Rev. Stat., which is applicable to all treaties. Under §5270 any one of the judicial officers named therein, may, upon complaint, charging one of the crimes named in the treaty, issue his warrant of arrest and hear the evidence of criminality. This done, his duty is, if he deems the evidence sufficient to hold the accused for extradition, to commit him to jail, and to certify his conclusion, with the evidence, to the Secretary of State, who may then, "upon the requisition of the proper authorities of such foreign government, issue his warrant for the surrender of the accused." Rev. Stat., §§5272, 5273. Of course, the effect of the supplementary treaty of 1884, being later than the statutory requirements above referred to, is to supersede the

statute in so far as there is a necessary conflict in the carrying out of the extradition obligation between this country and Italy. But, as observed in *Grin v. Shine*, 187 U.S. 181, 191, "Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient. *Castro v. DeUriarte*, 16 Fed. Rep. 93. This appears to have been the object of §5270, which is applicable to all foreign governments with which we have treaties of extradition." This section, by its very terms, applies "in all cases in which there now exists or hereafter may exist, any treaty or convention for extradition." Had there been no law of Congress upon the subject, the method of procedure prescribed by the supplementary treaty of 1884 would necessarily have been the proper one, and the committing magistrate could have proceeded only according to the treaty, for that would have been the only law of the land applicable to the case and the only source of his authority.

It was therefore competent for Judge Blair to act upon the complaint made before him independently of any preliminary mandate or certificate, such as was in fact issued and "exhibited" to him in this case, being plainly authorized so to do by the terms of §5270. The personal rights of the accused are saved by the provisions of the same section, since he could only have been surrendered upon the warrant of the Secretary of State, based upon the evidence presented upon the hearing, and the conclusion of the sufficiency of the evidence of criminality certified to the Secretary of State, and upon a formal requisition for extradition. *Castro v. DeUriarte*, 16 Fed. Rep. 93, 97; *Grin v. Shine*, *supra*.

Construed in the light of the original and supplementary conventions with Italy and of §5270, Rev. Stat., we do not find that it was obligatory that the "formal demand" referred to in the 1884 clause should be proven in the preliminary proceeding within forty days after the arrest. That is a demand made upon the executive authority of the United States by the executive authority of Italy. Its presentation was not necessary to give the examining magistrate jurisdiction. Such a formal demand was in fact made on July 28, 1910, less than forty days after the arrest. That, together with the certificate of the magistrate and the evidence submitted to him, was the authority of law under which the Secretary of State issued his warrant of extradition. Every requirement of the law, whether it appears in the treaty or in the act of Congress, was substantially complied with. This was the construction placed upon the treaty by Mr. Secretary Knox in answer to the same objection made to him before he issued his warrant, and also of Judge Rellstab, who dismissed the petition for a writ of *habeas corpus* and from whose decree this appeal comes.

Charlton v. Kelly, Sheriff of Hudson County, New Jersey, 229 U.S. 447, 463-465 (1913).

Amendment
of requisition

When a request for extradition alleges one offense and the United States commissioner before whom a hearing is had holds the accused on an entirely different charge, the demanding government may be afforded an opportunity to amend its request so that it will cover the same charge on which the accused is held.

The Second Assistant Secretary of State (Adce) to the British Ambassador (Bryce), Apr. 5, 1913, MS. Department of State, file 211.41H38/1.

The Mexican Chargé d'Affaires ad interim requested the extradition of Lazaro Berruecos de Lara on a charge of robbery. After the necessary extradition proceedings had been instituted against the accused, the Chargé informed the Secretary of State that the true name of the accused was Lazaro Gutierrez de Lara. Thereafter, the Mexican Government advised that the designation of the crime of robbery should be changed to larceny. The Department of State informed the Attorney General that it "would be glad if the necessary instructions could be given to the United States Attorney for the appropriate district, in order that the present proceedings against the fugitive may be discontinued and new proceedings instituted upon the charge of larceny".

The Mexican Chargé d'Affaires ad interim (Godoy) to the Secretary of State (Root), Sept. 21, 1907, MS. Department of State, file 8600; Señor Godoy to Mr. Root, Sept. 25, 1907, *ibid.* 8600/1; the American Ambassador to Mexico (Thompson) to Mr. Root, Oct. 22, 1907, *ibid.* /3; Mr. Root to Attorney General Bonaparte, Oct. 28, 1907, *ibid.* /4.

The Mexican Government requested the extradition of two fugitives on charges of murder. After the necessary forms of law had been complied with, the Secretary of State transmitted to the Mexican Ambassador a warrant for the surrender of the accused. The Ambassador later stated:

"... the Governor of the State of Zacatecas reports to the Department of Foreign Relations of my Government that the men bearing the name of Reynoso who were delivered up under the requisition are not Primitivo and Placido Reynoso but other brothers who had changed their names.

"By special direction of my Government, I venture to offer the foregoing explanation and beg that the request of this Embassy for the extradition of the true suspects Primitivo and Placido Reynoso be allowed to stand."

The true suspects later were surrendered under the original warrant.

The Mexican Chargé d'Affaires ad interim (Godoy) to the Acting Secretary of State (Bacon), Oct. 3, 1907, MS. Department of State, file 8790; the Secretary of State (Root) to the Mexican Ambassador (Creel), Dec. 3, 1907, *ibid.* 8790/3-4; Señor Creel to Mr. Root, Jan. 13, 1908, *ibid.* /6.

Withdrawal
of requisition

On request of the Government of Mexico, Juan Herzfeld, charged with larceny from the Mexican National Sugar Refining Company in Mexico, was provisionally arrested and detained with a view to his extradition. At the hearing in New York, counsel for the company appeared and stated that the company did not desire to have the charges pressed as the accused had made practically complete restitu-

tion and that it was the opinion of the company that he should have another chance.

The matter was brought to the attention of the Mexican Ambassador who replied that "This Embassy therefore withdraws its request for the provisional detention of the said party."

The Mexican Chargé d'Affaires ad interim (Godoy) to the Acting Secretary of State (Adee), June 27, 1908, MS. Department of State, file 14353. The Acting Attorney General (Hoyt) to the Secretary of State (Root), July 24, 1908; the United States attorney at New York (Stimson) to the Attorney General (Bonaparte), July 23, 1908; the Acting Secretary of State (Bacon) to the Mexican Ambassador (Creel), July 27, 1908: *ibid.* 14353/4-6; Mr. Creel to Mr. Adee, Aug. 10, 1908, *ibid.* /10.

The British Ambassador, in 1921, informed the Secretary of State that, in view of the serious illness of William Fink, against whom extradition proceedings had been instituted with a view to his eventual surrender to Canada, it was not the intention of the Canadian authorities to press further for the surrender of the fugitive. Ambassador Geddes to Secretary Hughes, Nov. 23, 1921, MS. Department of State, file 211.42F49/5.

Extradition papers usually consist of the request for extradition; certified copies of the indictment or information, of the warrant of arrest, and of the law or laws under which the accused is charged; evidence in the form of affidavits or depositions, with exhibits, sufficient to justify the committal of the accused for trial in the asylum country if the crime or offense had been committed in such asylum country; and evidence to identify the accused. In the event that the prisoner has been convicted in the demanding country, a certified copy of the sentence of the court before which the conviction took place is substituted for the evidence in support of the charge. A proper authentication of the several documents is equally a part of the extradition papers. There is no prescribed method for the transmission of these papers. As a general rule they are transmitted through the diplomatic representative of the demanding state. This is true especially in those cases where the applicable treaty requires, as does article 4 of the extradition treaty concluded on September 26, 1896 between the United States and Argentina, that the formal requisition for extradition be accompanied by a legalized copy of the sentence of the judge, or of the warrant of arrest; by such evidence as may be necessary to establish the identity of the person demanded; and by a duly certified copy of the law applicable to the act charged, as shown by statute or judicial decision. In such a case it is the usual practice to enclose with the formal requisition the properly certified and authenticated extradition papers. Occasionally, they are handed either directly or indirectly to the agent appointed to receive the surrender of the accused. The latter method is seldom employed as it often involves

Transmission
of papers

the premature departure of the agent with a consequent unnecessary expense for maintenance pending the outcome of the case.

31 Stat. 1883, 1886; 1 Treaties, etc. (Malloy, 1910) 25, 26.

In connection with the request by the Governor of Maryland for the extradition from Great Britain of John Sullivan, charged in Maryland with manslaughter, the Department of State on October 30, 1906 instructed the American Ambassador in London:

The President's warrant, with a duly certified copy of the papers in this case, has been handed to the agent who will, on his arrival in London, place himself in communication with you. The Department's certificate attached to the copy of the papers in question should be authenticated under the Embassy's seal.

Acting Secretary Bacon to Ambassador Reid, no. 331, Oct. 30, 1906, MS. Department of State, file 1836/11a.

MAGISTRATES

§323

By section 5270 of the Revised Statutes of the United States, 18 U.S.C. §651, "any justice of the Supreme Court, circuit judge, district judge, or commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State" may "issue his warrant for the apprehension" of a person charged by a foreign government with having committed "within the jurisdiction of any such foreign government any of the crimes provided for" in a treaty or convention between the United States and the foreign country concerned, that he "may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered", and he may commit such person for extradition.

A judge of a United States District Court has jurisdiction under title 18, section 651, of the United States Code to commit for extradition alleged fugitives from the justice of foreign countries with which the United States has concluded treaties of extradition. *Bernstein v. Gross, Marshal*, 58 F. (2d) 154, 155 (C.C.A. 5th, 1932).

A judge of a State court has jurisdiction, under title 18, section 651, of the United States Code to conduct proceedings in extradition even though the accused is an officer of the Federal Government. *In re Kcene's Extradition*, 6 F. Supp. 308, 310 (D.C., S.D. Tex., 1934).

A United States commissioner has jurisdiction in extradition proceedings when such jurisdiction is expressly given by order of a United States District Court and when the accused is within such commissioner's district when apprehended. *Vaccaro v. Collier, United States Marshal*, 38 F. (2d) 862, 867 (D.C., D. Md., 1930).

The function of a committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction. *Grin v. Shine*, 187 U.S. 181, 197; *Benson v. McMahon*, 127 U.S. 457, 461; *Ex parte Glaser*, 176 Fed. 702, 704. Function

Collins v. Loisel, United States Marshal for the Eastern District of Louisiana, 259 U.S. 309, 316 (1922).

PRELIMINARY MANDATE

§324

Article IV of the extradition convention concluded on January 6, 1909 between the United States and France (3 Treaties, etc. [Redmond, 1923] 2580; 37 Stat. 1526, 1529) provides:

The arrest and detention of a fugitive may be applied for on information, even by telegraph, of the existence of a judgment of conviction or of a warrant of arrest.

In the United States, the application for arrest and detention shall be addressed to the Secretary of State, who shall deliver a warrant certifying that the application is regularly made and requesting the competent authorities to take action thereon in conformity to statute.

Although sometimes differently phrased, similar provisions are contained in several other agreements for extradition to which the United States is a party. When a treaty so provides, the certificate of the Secretary of State is required in order to bring about the provisional arrest and detention of the accused. However, provision usually is made in those treaties permitting arrest in case of urgency on complaint made directly to the competent magistrate, in conformity with the statutes in force and without the certificate.

Unless treaty stipulations require another or a different course to be pursued, a foreign country is authorized to institute extradition proceedings under section 5270 of the Revised Statutes of the United States without any precedent formalities. Some confusion has arisen because of a failure to distinguish between cases where the treaty contains stipulations respecting procedure and cases where it is silent, leaving, in the latter case, the statute as the controlling guide in matters before the extradition commissioner. Arrest
under
statute

Ex parte Schorer, 197 Fed. 67, 69 (D.C., E.D. Wis., 1912).

Article V of the extradition convention of 1868 concluded between the United States and Italy, 1 Treaties, etc. (Malloy, 1910) 966, 968, as amended by article II of the supplemental convention of 1884, *ibid.*

985, 986, provides for the issuance by the Secretary of State or the Minister of Foreign Affairs, as the case may be, of a certificate attesting that a requisition has been made by the Government of the other country to secure the preliminary arrest of a fugitive from justice. A request for such a certificate was made on June 26, 1925 by the Italian Ambassador, and the Acting Secretary of State replied:

**Refusal
to issue
certificate**

The Department has carefully examined the translation supplied by you of the evidence in the case and has been unable to find any reference therein to Michele Monti. Furthermore, the only references in the evidence to Dione Battaglia are contained in what is referred to as a memorandum of information given by the Chargé d'Affaires of your Embassy September 15, 1924. It appears from this memorandum that the offense committed by Battaglia was so committed in the United States and that he was sentenced therefor June 23, 1924, to two years' imprisonment at the Atlanta Penitentiary and to pay a fine of one thousand dollars.

Inasmuch, therefore, as the extradition documents transmitted by you do not establish that Monti has committed any offense and since the offense of Battaglia appears from these documents to have been committed within the United States and not in Italy, I regret to be obliged to inform you that I do not see my way clear to the transmission to you of a mandate looking to the arrest of these men with a view to their extradition. Accordingly I am returning the documents to you without such mandate.

The Italian Ambassador (Martino) to the Secretary of State (Kellogg), June 26, 1925, and the Acting Secretary of State (Grew) to Mr. Martino, July 6, 1925, MS. Department of State, file 211.65B32/-.

**Continuing
validity**

Acting pursuant to the provisions of the convention between the United States and Italy, the Secretary of State issued on November 9, 1907 a certificate stating that an application had been made by the Chargé d'Affaires ad interim of Italy for the arrest of Jannone Bernardo, charged in Italy with the crime of murder. Apparently the whereabouts of the accused was not ascertained until after he had been arrested and sentenced to a term in the Onondaga County (New York) Penitentiary. The term of imprisonment was to expire on October 13, 1916. On March 29, 1916 the Italian consular officer at Albany, New York, submitted to the United States commissioner at Utica the certificate mentioned, together with certain depositions taken in 1907. Although the consular officer was of the opinion that the commissioner's predecessor in office had issued a warrant for the arrest of Bernardo, the United States marshal's office was unable to find a record of such a warrant. The commissioner inquired of the Department of State whether the matter should be resubmitted to the Department before a warrant of arrest could be issued; whether the certificate issued by a previous Secretary of State should be renewed

or reissued before the commissioner could act in the matter; and whether new depositions had to be obtained. The Department informed the commissioner that—

the certificate referred to by you as having been issued by Secretary Root in 1907, might well be regarded as furnishing sufficient authority for the issuance by you of the warrant of arrest in this case. However, in order to avoid any possible question along this line which might be raised by the fugitive before the courts of this country, the Department has suggested to the Italian Embassy at this capital that it might be thought advisable to apply to the Department for a further certificate for use in the present proceedings.

Replying to your inquiry concerning the present force and validity of the evidence in this case, which appears to have been obtained in 1907, it may be said that the Department is not aware of any reason why such evidence would not be admissible at this time.

The Italian Chargé d'Affaires (Montagna) to the Secretary of State (Root), Dec. [Nov.] 7, 1907, MS. Department of State, file 9290/2; Commissioner Senior to Secretary Lansing, Mar. 30, 1916, and Second Assistant Secretary Adee to Mr. Senior, Apr. 7, 1916, *ibid.* 211.05M54/23.

Jan Pouren, whose extradition was requested by the Russian Government, moved to vacate the warrant which had been issued for his arrest in New York after he had been discharged under previous extradition proceedings. The motion was based upon the ground that no certificate had been issued by the Secretary of State of the United States certifying that a request had been made by the Russian Government for the arrest of the accused. It was admitted, however, that such a certificate was issued in connection with the first proceedings, and the evidence showed that, although a request had been made for a new certificate, the Chargé d'Affaires of Russia had been informed by the Assistant Secretary of State that a new certificate was not necessary. The District Court of the United States for the Southern District of New York stated:

Rearrest

... A certificate having been duly issued in the original proceeding, and the Secretary of State having expressly provided that that proceeding was dismissed without prejudice to the right of the demanding government to initiate a new proceeding, I think that no new certificate was necessary, and that, if any new certificate were necessary, the provision that the then pending proceeding was dismissed without prejudice to the right of the demanding government to initiate a new proceeding was in itself substantially a certificate, or the equivalent of a certificate.

Moreover, it is well settled that no such certificate is necessary. Although the treaty with Russia provides for such a certificate, section 5270 of the Revised Statutes (U.S. Comp. St. 1901, p. 3591), provides generally that a warrant of extradition may be issued

upon a complaint under oath, and the United States Supreme Court has held, in the case of *Grin v. Shine*, 187 U.S. 181, 23 Sup. Ct. 98, 47 L. Ed. 130, a case arising under the Russian treaty, that:

“While article 7 undoubtedly contemplates a prior certificate of the Secretary of State, the language of the article is merely permissive, and does not compel the production of such certificate before the warrant can be issued.”

The motion to vacate the warrant is denied, and the matter is referred to Samuel M. Hitchcock, United States Commissioner in extradition proceedings, to proceed with the hearing and take what further action is necessary in the case.

In re Schlippenbach, Imperial Russian Consul General, 164 Fed. 783, 784 (1908).

COMPLAINT

§325

A complaint is essential to the institution of extradition proceedings. In the United States, the law specifically requires that the complaint shall be made under oath, charging the person with having committed one or more of the crimes enumerated in the treaty of extradition. There are also certain general requirements which must be observed, as, for example, that the complaint shall be made by some person having authority from the demanding state.

Rev. Stat., sec. 5270; 18 U.S.C. §651.

It is not necessary that a complaint on which the issuance of a warrant of arrest is based shall be made before a judge as distinguished from a commissioner.

United States ex rel Lo Pizzo v. Mathues, United States Marshal, 36 F. (2d) 565, 566 (C.C.A. 3d, 1929).

In its consideration of a complaint made upon information and belief, the United States Circuit Court of Appeals for the Sixth Circuit said:

The complaint is upon information and belief, but it sets forth that it is made by the authority of, and at the request of, the British Columbia officials, and that the information upon which it was based was communicated to the complainant by those officials. It is advisable that certified copies of the foreign complaint and warrant be attached to and made a permanent part of the complaint; but it is sufficient if, as was done in this case, those documents, alleging positively the respondent's guilt, are presented to the commissioner with the complaint, and if depositions showing probable cause are produced at the hearing. *Glucksman v. Henkel*, 221 U.S. 508, 514, 31 Sup. Ct. 705, 55 L. Ed. 830; *Yordi v. Nolte*, supra, 215 U.S. 230-232, 30 Sup. Ct. 90, 54 L. Ed. 170.

Powell v. United States, 206 Fed. 400, 403 (1913).

The effect of a variance between the complaint and the evidence in extradition proceedings is a matter to be decided on general principles, irrespective of the law of the particular State in which the accused is detained.

Glucksman v. Hentel, United States Marshal, 221 U. S. 508, 513 (1911).

In returning to Judge Eldredge of the Thirteenth Judicial Circuit of the State of Illinois the papers purporting to be the record of the proceedings had before him in the matter of the application for the extradition to Canada of Adelard E. Lafond, the Acting Secretary of State explained, *inter alia*:

By whom
made

In the next place, the "complaint" was made by T. H. Brennan, city marshal of Ottawa, Illinois, and not by any person representing the demanding government, as required by the decision of Judge Brown (recently Associate Justice of the Supreme Court of the United States) in the case of *In re Ferrelle*, 28 Fed. 878, and later decisions of the Federal courts.

Acting Secretary Bacon to Judge Eldredge, Mar. 13, 1908, MS. Department of State, file 9194/15-16.

Gennaro Caputo was arrested, with a view to his extradition, on a complaint made by Rene Tanquerey who described himself as the Assistant Consul General of the French Republic in the city of New York, acting for and on behalf of the French Government, pursuant to authority delegated to him by the French Consul General. The accused raised the question whether the French Government could act in extradition proceedings through an assistant consul general. The court said:

The legal question, assuming that it is before us, although not presented below nor mentioned in the assignment of errors, is whether the French government may, under its treaty with the United States and the statutory provisions governing extradition proceedings, act in such proceedings through an assistant consul general. . . . Section 5270 of the Revised Statutes (18 U.S.C.A. §651) provides that the judicial officers therein specified may act "upon complaint made under oath." It does not state who shall make the oath.

. . . Extradition proceedings must be prosecuted by the foreign government in the public interest, and may not be used by a private party for private vengeance or personal purposes; but if in fact the foreign government initiates the proceedings, no reason is apparent why it may not authorize any person to make oath to the complaint on its behalf. Therefore, we cannot

accept the appellant's contention that a complaint based on information and belief must be sworn to by a consular officer.

President of the United States ex rel. Caputo v. Kelly, United States Marshal, et al., 92 F (2d) 603, 604-605 (C.C.A. 2d, 1937).

In connection with a request made on December 28, 1907 by the Attorney General of the United States for the provisional arrest and detention with a view to extradition from Canada of Daniel F. Keller, charged with larceny, perjury, forgery, and utterance of a forged obligation, the Department of State sent the following instruction to the Consul at Vancouver, British Columbia:

Unless statute has been superseded you will proceed under chapter one hundred and fifty-five of the Revised Statutes of Canada, 1906, section ten, by swearing out before the proper magistrate a complaint upon information and belief charging Captain Keller with larceny. The magistrate will then issue a warrant authorizing Keller's apprehension and detention until the arrival of the extradition papers. Usually consul does not need in these matters the assistance of local attorneys but if necessary in order to hold Keller upon extradition proceedings Attorney General authorizes the employment of Swanson.

The Attorney General (Bonaparte) to the Secretary of State (Root), Dec. 28, 1907, MS Department of State, file 10737; the Chief Clerk (Carr) to the Consul in Vancouver (Dudley), Jan. 10, 1908, *ibid* 10737/8.

Oath

Section 5270 of the Revised Statutes of the United States makes an oath to a complaint an absolute requirement, although an oath upon information and belief is sufficient. The Supreme Court of the United States stated:

... The complaint is sworn to upon information and belief, but it is supported by the testimony of witnesses who are stated to have deposed and whom therefore we must presume to have been sworn. That is enough. *Rice v. Ames*, 180 U.S. 371, 375.

Glucksman v. Henkel, United States Marshal, 221 U.S. 308, 514 (1911).

Information and belief

... The complaint was filed by an Assistant District Attorney of the United States for the District of New Hampshire. It alleged that the complainant was informed "through diplomatic channel" that the appellant was duly and legally charged by the United States of Mexico with the crime, and on behalf of that government prayed the arrest. Of course whatever form of words was used, the complaint necessarily was upon information, but as appeared at the hearing it was filed by order of the Attorney General, upon request of the Secretary of State, enclosing a request for the extradition from the Mexican Government and a copy of proceedings in a Mexican Court finding that the crime was duly proved against the appellant and ordering his arrest, many pages of evidence being appended. This was enough.

Fordi v. Nolte, 215 U.S. 227, 231, 232. *Rice v. Ames*, 180 U.S. 371, 375, 376. *Glucksmann v. Henkel*, 221 U.S. 508, 514.

Fernandez v. Phillips, U.S. Marshal, 268 U.S. 311, 312-313 (1925).

A complaint made on information and belief, the sources of which were "official correspondence that has passed between your deponent and the Department of Foreign Affairs of the United States of Mexico, and official communications that have passed between your deponent and the Mexican Government [Embassy] at Washington", was held to be sufficient to give a commissioner jurisdiction over an accused whose extradition had been requested by the Government of Mexico.

Ex parte Dinahart, 148 Fed. 858, 859 (C.C. S.D.N.Y., 1911).

The complaint, made by a British Consul General, on which John Bingham was arrested in the United States with a view to his extradition to Canada, set forth on information and belief the following facts: The accused, in February 1915, had received and retained in his possession money to the amount of \$1,500 in bills of the Bank of Montreal, the property of that bank, knowing it to have been stolen; a warrant had been issued by the police magistrate of Montreal for the apprehension of the accused; the offense with which he was charged was an offense within the treaties; and the deponent's information was based upon duly authenticated copies of a warrant issued by the police magistrate of Montreal and of the complaint or information upon which that warrant was issued, and upon certain depositions of witnesses submitted and to be filed with the present complaint, the depositions being those taken in Montreal. Following his commitment for the action of the Secretary of State, the accused petitioned for a writ of *habeas corpus*, insisting that the complaint filed by the Consul General did not allege that the offense was committed in Canada. The Supreme Court of the United States said, on appeal:

The criticism upon the complaint is unsubstantial. It is fairly to be inferred from what is stated that the crime was committed in Canada, and it is distinctly averred that appellant is a fugitive from justice from the District of Montreal, in that Dominion, and that the offense with which he is charged is an offense within the treaties between the United States and Great Britain. Besides this, it is stated that deponent's information is based upon authenticated copies of a warrant issued by the police magistrate of Montreal and of the complaint upon which that warrant was issued, and upon certain depositions submitted and to be filed with the present complaint; the depositions being those taken in Montreal. It is clear that the intent was to charge that the offense was committed in Canada.

Bingham v. Bradley, United States Marshal for the Northern District of Illinois, 241 U. S. 511, 515 (1916).

The Mexican Ambassador in Washington requested on May 11, 1907 the extradition of W. H. Mussey, J. M. Bacon, Juan O. Katz, Ponciano Navo, and Tiburcio Mejía, charged in Mexico with embezzlement and larceny. Acting pursuant to the convention on extradition concluded on February 22, 1899 between the United States and Mexico, the United States attorney at San Antonio, Texas, sought to make a complaint based upon information and belief with a view to obtaining the necessary warrant for the arrest of the accused men. The United States commissioner refused to entertain the complaint and to issue the warrant. The Attorney General of the United States enclosed with his letter dated June 5, 1907 to the Secretary of State a copy of a letter dated May 31, 1907 from the United States commissioner to the Assistant United States district attorney for the Western District of Texas, setting forth the commissioner's position as follows:

My authority to issue warrants in extradition cases is derived from Art. 5270, RS., which prescribes a "complaint made under oath," charging the person against whom complaint is made with having committed a crime.

According to my understanding you have received a letter from the Attorney General requesting you to make complaint, charging upon information and belief that Katz committed a crime of embezzlement in Mexico. I could not legally issue a warrant for the arrest of any person merely because the Attorney General requested it, and an information filed by you based upon the request of the Attorney General alone can have no more potency than the request itself.

I do not understand that you have any competent knowledge or information whatever that Katz has in fact committed any crime. You have no requisition proceedings, no statements, depositions or affidavits; and you have not discussed the case with witnesses and cannot, even upon information and belief, affirm such facts and circumstances as to time, place and manner as are necessary to constitute a charge of crime.

Having in mind these decisions and the constitutional provision, I am inclined to the opinion that the complaint you desire to make against this person is not such as is contemplated by law, nor such as would give me jurisdiction and warrant me in depriving any person of his liberty; and I am further of the opinion that even in an extradition case, it would be the duty of any court, having jurisdiction and to which application was made for a writ of habeas corpus, to instantly release any person thus illegally deprived of his liberty by such insufficient complaint and illegal and void warrant.

The Secretary of State informed the Attorney General as follows:

The contention advanced by Commissioner Scott seems to be the same as that which was raised by the extradition commis-

sioners in New York City in the cases of Jose Prieto, Philip McIntyre, and George Deering Reed, where the position was taken that neither the Revised Statutes of the United States nor the decisions of the federal courts gave them any authority to issue such warrants of arrest upon complaints by officers of the United States on information and belief. After much correspondence, in which the Department of State and the Department of Justice explained that the arrests were desired in accordance with the provisions of Article X of the treaty of extradition of 1899, between the United States and Mexico, the New York authorities appeared to have yielded their contention. This information was reported by your Department in its letter to the Department of State dated June 14, 1906.

The Department regrets that the same issue seems to have been raised in another jurisdiction, but hopes that it may be overcome, either by inducing Commissioner Scott to reconsider his decision, or by obtaining a warrant from some other competent authority in Texas; if necessary, from the judge of the United States District Court.

Ambassador Creel to Secretary Root, May 11, 1907, MS. Department of State, file 6443; Attorney General Bonaparte to Mr. Root, June 5, 1907, *ibid.* 6443/3-5; Mr. Root to Mr. Bonaparte, Nov. 21, 1907, *ibid.* /14; 31 Stat. 1818; 1 Treaties, etc. (Malloy, 1910) 1184.

... It is advisable that certified copies of the foreign complaint and warrant be attached to and made a permanent part of the complaint; but it is sufficient if, as was done in this case, those documents, alleging positively the respondent's guilt, are presented to the commissioner with the complaint, and if depositions showing probable cause are produced at the hearing. *Glucksman v. Henkel*, 221 U.S. 508, 514, 31 Sup. Ct. 704, 55 L. Ed. 830; *Yordi v. Nolte*, *supra*, 215 U.S. 230-232, 30 Sup. Ct. 90, 54 L. Ed. 170.

Warrant,
indictment, or
conviction

Powell v. United States, 206 Fed. 400, 403 (C.C.A. 6th, 1913).

The charge of murder sufficiently advises the petitioner of the offense that he is alleged to have committed, and it is sufficient to advise the court that it is an offense covered by the treaty. It is a common-law crime and needs no further definition as many statutory crimes like forgery, embezzlement, counterfeiting, etc., require.

Description
of offense

Ex parte Dinehart, 188 Fed. 858, 859 (C.C., S.D.N.Y., 1911).

If the complaint intelligibly describes and identifies the offense, and if the offense so described is punishable by the laws of both countries, and if by any name it is included in the extradition treaty, that is enough. *Yordi v. Nolte*, 215 U.S. 227, 230, 30 Sup. Ct. 90, 54 L. Ed. 170, and cases cited; *Strassheim v. Daily*, 221 U.S. 280, 31 Sup. Ct. 558, 55 L. Ed. 735; *Greene v. U.S.* (C.C.A. 5) 154 Fed. 401, 406, 85 C.C.A. 251.

Powell v. United States, 206 Fed. 400, 403 (C.C.A. 6th, 1913).

The district attorney of Kings County, New York, transmitted to the Department of State on December 22, 1909 an application by the Governor of New York for the extradition from Canada of Arthur Zimmerman, charged in New York with perjury. Pursuant to the Department's instructions, the Consul at Hamilton, Ontario, instituted extradition proceedings against Zimmerman. Although the accused was surrendered, the Consul informed the Department:

Referring to the "information or complaint" required in Sec. 10. Chap. 155 of the Revised Statutes of Canada, I am advised by S. F. Washington, K.C., Crown Attorney for Wentworth County, Ontario, that the following items should appear in such information to comply with Canadian law and practice, viz.:

1. Name of fugitive.
2. Former residence.
3. Date of commission of offense.
4. Place where offense committed.
5. Short description of offense, as for example: "Murdered John Jones," or "Forged name of John Jones to a promissory note, dated 1st January, 1910, payable to William Smith, for \$100."
6. Place in Canada where fugitive is supposed to be located.
7. Source from which information is obtained.

District Attorney Clarke to Secretary Knox, Dec. 22, 1909, MS. Department of State, file 22850; Consul Shepard to the Assistant Secretary of State, Feb. 17, 1910, *ibid.* 22850/9.

A complaint in extradition is not defective for failure to set forth specifically the name of the place where the crime was alleged to have been committed when it may fairly be inferred from what has been stated in the complaint that the crime was committed in the demanding country.

Bingham v. Bradley, United States Marshal for the Northern District of Illinois, 241 U.S. 511, 515 (1916).

Heinrich Zentner sought by a petition for a writ of *habeas corpus* to resist his surrender to Bavaria. He alleged that the complaint against him was defective because it did not set forth copies of the instruments which he was charged to have forged. The District Court of the United States for the District of Massachusetts said:

It is claimed that the complaint is defective because it does not set forth copies of the instruments alleged to have been forged. The commissioner ruled, and with his ruling I agree, that the complaint, which appears in full in his record, sets forth the offense with sufficient particularity to advise the accused of the offense wherewith he is charged. The amounts of the drafts are stated in it, and they are alleged to have been accepted by the drawees before the alterations charged were made. The particularity of an indictment is not required if a crime within the treaty is substantially charged. *U.S. v. Herskovitz (D.C.) 136 Fed.*

713; *Grin v. Shine*, 187 U.S. 181, 23 Sup. Ct. 98, 47 L. Ed. 130; *Yordi v. Nolte*, 215 U.S. 227, 30 Sup. Ct. 90, 54 L. Ed. 170.

Ex parte Zentner, 188 Fed. 344, 347 (1910).

PROVISIONAL ARREST AND DETENTION

§326

With a view to preventing the escape of alleged fugitives from justice, the treaties of extradition frequently provide for the provisional arrest and detention of such persons pending the receipt of a formal requisition and supporting documentary evidence. For example, article IX of the extradition convention concluded on August 9, 1904 between the United States and Haiti (1 Treaties, etc. [Malloy, 1910] 941, 944; 34 Stat. 2858, 2862) reads:

Where the arrest and detention of a fugitive in the United States are desired on telegraphic or other information in advance of the presentation of the formal proofs, complaint on oath, as provided by the statutes of the United States, shall be made by an agent of the Haitian Government, before a judge or other magistrate authorized to issue warrants of arrest in extradition cases.

In Haiti the diplomatic or consular agent of the United States shall address, through the Ministry of Foreign Relations, a complaint to the government commissioner or any other magistrate authorized to issue warrants of commitment. The provisional arrest and detention of a fugitive shall cease and the prisoner be released if a formal requisition for his surrender, accompanied by the necessary evidence of criminality, has not been produced under the stipulations of this Convention within sixty days from the date of his arrest.

A slightly different provision is contained in article VI of the extradition treaty concluded on April 29, 1886 between the United States and Japan (1 Treaties, etc. [Malloy, 1910] 1025, 1027; 24 Stat. 1015, 1016) and in one or more other treaties to which the United States is a party. A further modification is contained in article IV of the convention concluded on January 6, 1909 between the United States and France (3 Treaties, etc. [Redmond, 1923] 2580, 2582; 37 Stat. 1526, 1529).

In connection with the request made in 1907 by the Ambassador of Mexico for the provisional arrest and detention with a view to the extradition to Mexico of Eduardo Ramirez, the Attorney General of the United States informed the Secretary of State as follows:

Information
required

I have the honor to transmit the following telegram from the United States Attorney at Nogales Arizona for such action as may be deemed appropriate:

"Under directions your letter dated 20th inst had Ramírez and Pina arrested here last night for forgery committed at Nogales, Sonora, Mexico, last August and they are being taken today by U.S. Marshal to Tucson for hearings before Campbell, Dist. Judge. Must have immediately details of forgery and copies of papers to frame new complaint against fugitive[s] as the facts stated in your letter are not full enough on which to base a sufficient complaint to hold them as there will be resistance to their extradition. Please send all papers to me at Phoenix."

In bringing this telegram to the attention of the Mexican Ambassador, the Acting Secretary of State stated in part:

This Department has endeavored to make clear in its telegram that the Mexican Government has furnished all the information required by the treaty, to obtain the provisional arrest and detention of the fugitives. The copies are, however, transmitted for your information, and perhaps for your consideration as to whether it may not, under the circumstances, be desirable to present the formal extradition papers to the examining judge or magistrate with the least possible delay.

The Acting Secretary at the same time informed the Attorney General that—

Under article ten extradition treaty of 1899 with Mexico, sufficient authority exists for provisional detention of fugitives if information has been received through diplomatic channel showing that warrants have been issued in Mexico charging extraditable crime, together with assurance that formal papers will follow. Such information has been received. No requirement in treaty that details of offense must be supplied in order merely to obtain temporary detention for forty days which is allowed by this article for presentation of documentary evidence. Department would be glad to have district attorney at Nogales instructed to above effect. Same practice has been followed for years by United States district attorneys in New Mexico and Texas. See also Department's letter of May 13, 1906 and your reply of June 14th following, case of George Deering Reed.

Ambassador Creel to Secretary Root, no. 3, Feb. 15, 1907, MS. Department of State, file 4644; Attorney General Bonaparte to Mr. Root, telegram of Mar. 27, 1907, and Acting Secretary Bacon to Mr. Creel, no. 21, Mar. 28, 1907, *ibid.* 4644/4; Mr. Bacon to Mr. Bonaparte, telegram of Mar. 28, 1907, *ibid.* /5A.

To comply with Canadian law and practice in extradition cases these additional particulars should be given regarding Horace W. Wood: former residence in Pennsylvania, date of commission of offense, place where offense committed, short statement describing nature of offense and source from which information is obtained. Description or other means of identification of fugitive should also be given.

The Second Assistant Secretary of State (Adee) to the Governor of Pennsylvania (Stuart), telegram of Mar. 4, 1910, MS. Department of State, file 23805/-.

Regarding the proposed extradition from Canada of Rufus Crow, charged in Alabama with murder, the American Consul General at Ottawa stated that—

in conversation with the Chief of Police of this city, I am informed that he has personally interviewed the person who was suspected of being the fugitive from justice, Rufus Crow and that he fails to find the marks indicated in the description. He does not therefore feel warranted in arresting the man even upon suspicion.

Consul General Foster to the Assistant Secretary of State, June 26, 1908, MS. Department of State, file 14041/10.

The district attorney of Queens County, New York, wrote to the Secretary of State in 1908 enclosing copies of correspondence between his office and the Italian Consul General at New York in regard to Angelo Luigi Gianini, who was wanted in New York on a charge of murder. The district attorney stated:

Indictment
not required

It is feared that Gianini's friends will know of the recent inquiries made by me in the matter and that he may be warned to escape from France.

Will it be in any way possible for the State Department to notify the French authorities of the facts in the case, requesting the apprehension of Gianini and that he be held until an indictment can be obtained at the October session of the Grand Jury of this county.

The Acting Secretary of State replied that—

an indictment is not really essential to the institution of extradition proceedings. As a matter of fact, if the Department is advised that a warrant has issued, charging the accused in a particular case with an offense which is extraditable under our treaties, the Department will make a request on the foreign government for the provisional arrest and detention of the fugitive.

District Attorney Darrin to Secretary Root, July 29, 1908, and Acting Secretary Bacon to Mr. Darrin, Aug. 5, 1908, MS. Department of State, file 14862/3.

What was done in this case has beyond question been the practice in this district for many years. As it has been challenged, I have looked into it afresh. In my judgment, it is within the letter and spirit of most, if not all, of our extradition treaties, and particularly of that with Great Britain, to arrest and hold for a reasonable time pending examination a person accused of crime abroad, and to do this on telegraphic request, provided the request is made by such person or persons that officials here rep-

Telegraphic
request

resenting both the high contracting parties are justified in believing the truth of the statements contained in the telegram. Any other system of working under extradition treaties would be impossible, and in these days of easy communication and rapid travel would facilitate the escape of persons who, if not criminals, do not care to meet their accuser.

United States ex rel. McNamara v. Hunkel, Marshal, 46 F. (2d) 84 (D.C., S.D.N.Y., 1912)

Ralph Nelson, city attorney of Kansas City, Kansas, wrote to the Department of State in 1906 stating that James E. Connell, a clerk for the Board of Park Commissioners, had forged nine city warrants and obtained about \$2,200 of the city's money. Information was requested as to the steps necessary to effect the return of Connell from Mexico to Kansas for trial. Details of the procedure to be followed were outlined by the Department as follows:

In reply I enclose herewith a copy of the treaty of extradition between the United States and Mexico, from which you will see that forgery is an extraditable offense. I also enclose a copy of the Department's general extradition circular. Applications for extradition should be made in strict accordance with the requirements of this circular.

The Department would state that if it is desired to have the fugitive provisionally arrested in advance of the presentation of the formal extradition papers, the procedure to secure this end is set forth in Article X of the treaty and at the bottom of page 2 of the circular. If provisional detention is desired, the Governor of your State should make a request to this effect, either by telegraph or by letter, giving the name of the fugitive, the crime with which he is charged, and stating that a warrant has been issued in Kansas for the fugitive's arrest and that formal extradition papers will be prepared and forwarded as soon as possible. The location and description of the fugitive should likewise be given, unless there is someone on the ground who can identify him, of which fact this Department should be informed. This preliminary request, as well as the formal requisition which follows, must come from the Governor of the State. In transmitting his formal requisition he should furnish a certificate concerning the purpose for which the extradition is desired, in accordance with the requirements of the enclosed circular.

It will not be necessary for anyone to come to Washington with the extradition papers. After they are prepared they may be forwarded here by mail.

The city attorney informed the Department that he was mailing, under separate cover, the formal requisition papers issued by the Governor of Kansas requesting the extradition of the accused, and inquired what further steps were necessary, to which the Department replied:

The application papers have been retained in this Department, pending the receipt of the above mentioned certificate, when they will be forwarded to the Ambassador of the United States at Mexico City, by whom they will be presented to the proper Mexican authorities, in case of the apprehension of the fugitive.

At the time that the papers are sent to Mexico the Department will forward to you, or to the Governor of Kansas, or wherever the Governor may direct, the President's warrant authorizing James E. Porter to receive the fugitive.

The city attorney of Kansas City (Nelson) to the Secretary of State (Root), Nov. 10, 1906, and the Acting Secretary of State (Bacon) to Mr. Nelson, Nov. 14, 1906, MS. Department of State, file 2248; Mr. Nelson to Mr. Root, Dec. 17, 1906, and Mr. Bacon to Mr. Nelson, Dec. 22, 1906, *ibid.* 2248/2-3.

In reply to a request from the deputy prosecuting attorney of Lake County, Indiana, for the provisional arrest and detention with a view to extradition from Great Britain of Moncilo Milosevich, charged in Indiana with embezzlement, the Secretary of State informed him that—

Department can act only upon request of Governor who should state that warrant of arrest has been issued.

The deputy prosecuting attorney (Hodges) to the Secretary of State (Knox), telegram of Nov. 20, 1909, and Mr. Knox to Mr. Hodges, telegram of Nov. 22, 1909, MS. Department of State, file 22419.

The Cuban Minister inquired of the Secretary of State whether, when a fugitive from the justice of Cuba had fled to the United States, the Cuban Government might make the necessary inquiries to ascertain the whereabouts of the fugitive without the services of private detectives, provided that it paid the cost of such inquiries. The Acting Secretary of State informed him that—

Obligation
to effect

it has been the custom of the Department in recent years to assist the demanding Government, so far as it consistently can, in discovering the whereabouts of a fugitive from justice, upon the understanding, which should be set forth in the request for such assistance, that the expenses of making the investigation incident to such discovery are to be refunded by the demanding Government.

Minister Padró to Secretary Root, June 13, 1907, and Acting Secretary Bacon to Señor Padró, July 15, 1907, MS. Department of State, file 7074.

The Argentine Chargé d'Affaires ad interim inquired whether the Secretary of State would ask the police authorities of the United States to ascertain the whereabouts of Oreste Rosen, charged in Argentina with fraudulent bankruptcy, and was informed that—

Assistance
by State
or Federal
officers

the search for and location in the United States of offenders against the laws of other countries is generally accomplished through the agency of private detectives, with such assistance as the local police can from time to time give in the ordinary course of their duties, which have to do with crimes and offenses committed in the United States.

It may be stated, however, that inasmuch as fraudulent bankruptcy is not an extraditable crime under the treaty of extradition in force between the United States and the Argentine Republic, the fugitive could not be lawfully held for extradition. If a knowledge of the whereabouts of the fugitive is desired for the purpose of obtaining a recovery of the property, this should be done through private channels.

Later the American Chargé d'Affaires ad interim at Buenos Aires was requested by the Minister for Foreign Affairs to obtain further information in the matter. The Acting Secretary of State made the following statement:

Concerning the location and arrest by this Government of criminals fugitive from other states, and within its jurisdiction, it should be said that in cases where a crime for which extradition can be obtained has been committed, and the approximate location of the fugitive is furnished, the local police authorities are usually pleased upon appropriate request, to cooperate and render whatever assistance they can to secure the apprehension of the fugitive, and, so far as the Department is aware, this voluntary action of the local officials is generally sufficient to accomplish the object desired.

Therefore, if in cases of extradition from the United States to the Argentine Republic, under our treaty of extradition with that country, information be furnished, either to this Department or to the local authorities, concerning the criminal's supposed place of refuge, it is probable that these authorities will fully extend all the assistance that is necessary to effect the arrest of the persons desired.

The Argentine Chargé d'Affaires (Portela) to the Secretary of State (Root), Sept. 28, 1907, and the Acting Secretary of State (Bacon) to Señor Portela, Oct. 15, 1907, MS. Department of State, file 8682/-1; the Chargé d'Affaires in Buenos Aires (Wilson) to Mr. Root, Jan. 10, 1908, and Mr. Bacon to Mr. Wilson, Feb. 29, 1908, *ibid.* /3.

While the treaties of extradition to which the United States is a party usually contain some provision concerning the arrest of an alleged fugitive, such an arrest would be required by section 5270 of the Revised Statutes of the United States (18 U.S.C. §651) even though the treaty contained no such provision. This section expressly provides for the apprehension of any fugitive "found within the limits of any State, District or Territory". The arrest is provisional, pending the termination of a hearing begun within the time-limit prescribed by the treaty and resulting in the commitment of the accused for the

action of the Secretary of State. Like the formal request for extradition, requests for provisional arrest and detention, in accord with treaty provision, should be made through diplomatic channels, except that under the convention of 1899 between the United States and Mexico the Governors of the frontier States may address each other directly and in urgent cases a complaint may be made directly to a competent magistrate.

The Acting Secretary of State informed Judge Eldredge of the Thirteenth Judicial Circuit of the State of Illinois that section 5270 of the Revised Statutes makes a warrant of arrest the basis of the ordinary proceedings in a case of extradition to a foreign country.

Acting Secretary Bacon to Judge Eldredge, Mar. 13, 1908, MS. Department of State, file 9194/15-16.

An illegal arrest does not invalidate a subsequent arrest, otherwise valid, merely because the subsequent arrest was effected immediately upon the discharge of the accused from the illegal arrest. The Supreme Court, in considering the proposed extradition to Canada of Thomas Kelly, stated:

Prior
illegal
arrest

But however illegal the arrest by the Chicago police it does not follow that the taking of the appellant's body by the marshal under the warrant of October 2 was void. The action of the officers of the State or city did not affect the jurisdiction of the Commissioner of the United States. Furthermore the order dismissing the complaint of October 2 was that the appellant be discharged forthwith from custody; so that on the face of the record it would seem that before being held under the present warrant the appellant had the moment of freedom which he contends was his right. It is urged that the Canadian authorities are trying to take advantage of their own wrong. But the appellant came within reach of the Commissioner's warrant by his own choice, and the most that can be said is that the effective exercise of authority was made easier by what had been done. It was not even argued that the appellant was entitled to a chance to escape before either of the warrants could be executed. This proceeding is not a fox hunt. But merely to be declared free in a room with the marshal standing at the door having another warrant in his hand would be an empty form. We are of opinion that in the circumstances of this case as we have stated them the omission of a formal act of release and a subsequent arrest, if they were omitted, furnished no ground for discharging the appellant upon *habeas corpus*. All the intimations and decisions of this Court indicate that the detention of the appellant cannot be declared void.

Kelly v. Griffin, Jailer of Lake County, Illinois, 241 U.S. 6, 12-13 (1916).

An arrest based upon documents which abundantly establish probable cause meets the requirement of the fourth amendment to the

Fourth
amendment

Constitution, which provides that no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Ex parte La Mantia, 206 Fed. 330, 331 (D.C., S.D.N.Y., 1913).

**Preventive
measures**

Assuming that your telegram April 19 may be preliminary to request that Department ask Serbia or some other foreign country for provisional arrest of Rasovics with view to his extradition you are advised such request must be made by Governor and state warrant issued for fugitive's arrest in Washington. In the meantime control officers at principal Atlantic ports have been instructed to refuse him permission to depart and Serbian Minister states he will be refused passport if he applies under name of Rasovics.

The Secretary of State (Colby) to the sheriff of Seattle (Stringer), telegram of Apr. 21, 1920, MS. Department of State, file 200.11R18/Orig.

In order to prevent the entry into the United States of Sandow Donovan, charged in the Irish Free State with murder, a circular instruction was sent to American consular officers to suspend final action upon any application made by the accused for an immigration visa and to communicate immediately with the Department of State. The Assistant Secretary of State (Carr) to consular officers, Jan. 14, 1932, MS. Department of State, file 211.41 Donovan, Sandow/4.

**Complaint
required**

... the appropriate course for you to adopt would be to authorize a consul of Norway, or some other person who can properly act for the demanding government, to appear before an extradition magistrate and obtain a warrant for the arrest of the fugitive, in accordance with Section 5270 of the Revised Statutes of the United States.

The papers are returned herewith for presentation to the magistrate before whom the case shall be examined.

The Acting Secretary of State (Bacon) to the Norwegian Minister (Hauge), Oct. 30, 1907, MS. Department of State, file 9513/-5.

With reference to Mr. Bacon's question as to the exact degree of authority which an officer must show to obtain recognition from the Canadian authorities I beg leave to refer to section 6 of the Extradition Act from which it appears that an extradition judge may issue his warrant for the arrest of a fugitive on an information or complaint laid before him and on such evidence or after such proceedings as would, subject to the provisions of the Act, justify the issue of a warrant if the crime had been committed in Canada. It does not appear that there is any restriction as to the person making the complaint or laying the information.

The Ambassador of Great Britain (Durand) to the Acting Secretary of State (Adee), no. 170, Sept. 7, 1906, MS. Department of State, file 860/2, enclosure.

It has been held that if proceedings are instituted under section 5270 of the Revised Statutes, a certificate issued by the Secretary of State that an application for the extradition of the person named therein has been made is not required for the issuance of a warrant of arrest, notwithstanding that the treaty with the demanding country may provide for such certificate. **Issuance of mandate**

In re Schlippenbach, 164 Fed. 783, 784 (D.C., S.D.N.Y., 1908), relying on *Grin v. Shine*, 187 U.S. 181 (1902).

Following the refusal of a United States marshal in Montana to serve a warrant issued by the United States commissioner at Chicago for the arrest of Halvor Halsen with a view to his extradition to Canada, the matter was referred informally to the Department of Justice, which instructed the marshal to serve the warrant. **Execution of warrant**

The British Ambassador (Geddes) to the Secretary of State (Hughes), memorandum of Apr. 8, 1921. MS. Department of State, file 211.41H16/-; Mr. Hughes to Mr. Geddes, Apr. 23, 1921, *ibid.* /1.

To prevent undue detention of alleged fugitives from justice the treaties of extradition usually provide a definite period for detention following arrest and pending the production of the documents upon which claim for extradition is based. The period varies from 40 to 60 days, depending in large measure on the distance separating the asylum and the demanding states and the means of communication. **Period of detention**

Article X of the convention concluded on February 22, 1899 between the United States and Mexico, cited *ante*, p. 82, provides that "each government shall endeavor to procure the provisional arrest of such criminal and to keep him in safe custody for such time as may be practicable, not exceeding forty days, to await the production of the documents upon which the claim for extradition is founded". In passing upon a petition for a writ of *habeas corpus* filed by George Deering Reed for discharge from arrest for failure to proceed within the prescribed period, the District Court of the United States for the District of New Jersey stated:

Counsel for the United States of Mexico contends that the effect of the 40-day limitation, in the last clause of the tenth article of the treaty, is simply to relieve the authorities of our government from the obligation to aid the Mexican authorities after the expiration of 40 days from the date of the provisional arrest. So reading the article, the argument is that the treaty does not belong to that class of treaties which give to a prisoner a right to his discharge if certain documents or proofs are not produced against him within a prescribed period, but to that class in which no time for the detention of a prisoner under provisional arrest is prescribed, and in which the Commissioner has a discretionary power to prolong the detention for a reasonable period. But it does not seem to me that the construction thus contended for is a reasonable one. The fugitive is to be kept

in safe custody "to await the production of the documents upon which the claim for extradition is founded." There is no intimation that he may be held "to await" their production after the 40 days are expired. Indeed, the language used excludes such an idea. The reasonable construction is that if the documents on which the claim for extradition in a given case is founded are produced within 40 days after the provisional arrest, and the proofs are in proper form, the fugitive may be committed for extradition; and that if they are not produced within that period the case shall no longer be regarded as one within the provisions of the treaty. If the documents are not produced within the 40 days, there is no authority for detaining the fugitive longer "to await" their production. I think the principle to be applied in this case is the same one that was applied by Judge Lacombe in the Dawson Case (C.C.) 101 Fed. 253.

Ex parte Reed, 158 Fed. 891, 893 (1908).

William F. Walker, whose extradition from Mexico was requested by the Governor of Connecticut, sought to obtain his release in Mexico by means of an *amparo*. He asserted that article X of the convention of 1899 had been violated by his detention for more than 40 days, awaiting the presentation of the extradition papers. The Supreme Court of Mexico stated that—

the rule adopted by both nations according to the text of the above mentioned article, is that the forty days be counted from the date of the imprisonment of the fugitive to the date in which the documents in support of the extradition are submitted to the Foreign Office, the imprisonment of the accused having occurred on the 15th of December, 1907, and the filing of the documents on the 17th of January, 1908, that is, thirty-four days.

The Minister of Foreign Affairs of Mexico, in bringing this decision to the attention of the American Ambassador, stated in part as follows:

This Department has always interpreted, and the Supreme Court bases its present action on an identical interpretation to decline the federal *amparo* to Walker, that the term for the presentation of the documents should be counted from the date of the detention of fugitives to the date on which such documents are filed with the Department of Foreign Affairs; but as the Department in Washington, in a recent case, has expressed the opinion that the term should be counted up to the time on which the documents reach the Judge or commissioner who has to take cognizance of the extradition, I shall appreciate it if Your Excellency would kindly invite the attention of your Government to the above-mentioned decision of the Court to the end that a mutual or common accord may be had on the interpretation of Article Ten of the Extradition Treaty between Mexico and the United States.

In an instruction dated July 22, 1908 to the Ambassador at Mexico City the following statement was made:

In reply I enclose herewith a copy of recent correspondence between the Department and the Mexican Embassy and between the Department and the Attorney General, from which it will be seen that the Department concurs in the view of the Mexican Government that the term for the presentation of the extradition papers should be counted from the date of the detention of a fugitive to the date on which such papers are filed in the foreign office of the country in which the fugitive is apprehended.

The Mexican Minister of Foreign Affairs (Mariscal) to Ambassador Thompson, July 4, 1908, and the Acting Secretary of State (Bacon) to Mr. Thompson, July 22, 1908. MS. Department of State, file 5485/98-100.

In March 1908 the Mexican Chargé d'Affaires pointed out that it appeared that the rule followed in the United States in interpreting article X of the convention of 1899 was to count the period of detention of 40 days following the provisional arrest of the offender from the date of his arrest to the day of presentation of the papers to the magistrate in charge of the case as distinguished from presentation to the Department of State. He added that the Ministry of Foreign Affairs of Mexico did not concur in that interpretation. The matter was referred to the Attorney General, who in an opinion of July 10, 1908 informed the Secretary of State:

Computation
of period
of detention

. . . in my opinion, the forty days during which the prisoner may be detained under the terms of this treaty "to await the production of the documents upon which the claim for extradition is founded" must be considered as meaning forty days prior to the production of the documents to the State Department in the United States or the corresponding branch of the Mexican Government, and if the said documents are thus produced within forty days, the suspected criminal has no absolute right of release under the terms of the treaty, but may be detained for a reasonable additional period to afford time for an investigation into his probable guilt or innocence.

Chargé Godoy to Secretary Root, Mar. 3, 1908, MS. Department of State, file 12208; Attorney General Bonaparte to Mr. Root, July 10, 1908, *ibid.* 12208/1; 27 Op. Att. Gen. 4 (1908).

Article X of the extradition treaty of 1930 between the United States and Germany (4 Treaties, etc. [Trenwith, 1938] 4216, 4219; 47 Stat. 1862, 1869) provides that a person "provisionally arrested shall be released, unless within one month from the date of commitment . . . the formal requisition for surrender with the documentary proofs . . . be made by the diplomatic agent of the demanding government". The same article provides that each Government shall upon request of the

Extension
of period

other "address to the competent authorities an application for the extension of the time . . . so as to allow an additional month for the purposes indicated".

The German Embassy, in a memorandum dated October 16, 1931, informed the Secretary of State that Heinrich Rudolf Conrad Pattenhausen had been placed under provisional arrest on October 1, 1930 in New York; that a requisition for the surrender of the fugitive was intended; that one of the principal witnesses in the case against the accused had left the city of Bremen and could not be located at that time; and that, under the circumstances, it was requested that the time for the formal requisition of surrender as provided in article X of the treaty be extended for another month. The Under Secretary of State replied on October 21, 1931:

. . . It is deemed appropriate in connection with the foregoing to invite attention to the fact that paragraph two of Article X of the Extradition Treaty provides that

"The arrest of the fugitive shall be brought about in accordance with the laws of the party to which the request is made."

If the arrest of Pattenhausen has not been brought about in accordance with the statutory provisions of the United States [sec. 5270, Rev. Stat.], it is suggested that it would be advisable to instruct a representative of your government to have such action taken at an early date.

In any event, the Department should be informed as to the exact circumstances under which Pattenhausen has been arrested. In the absence of information on this point, the Department would not appear to be in a position to address to the competent authority the application for the extension of time contemplated in paragraph four of Article X of the Extradition Treaty and made in the note under acknowledgment.

It is further suggested that in the later note which it is presumed will be forthcoming from your Embassy in regard to the matter under consideration, reference be made not only to the formal requisition for Pattenhausen's surrender but also to the matter of the production of the documentary proofs.

The Secretary of State, nevertheless, on October 30, 1931 addressed a telegram to the United States commissioner for the Southern District of New York expressing the hope that the commissioner would see his way clear to grant the extension. The commissioner complied.

The German Embassy to the Secretary of State, memorandum of Oct. 16, 1931, MS. Department of State, file 211.62 Pattenhausen, Heinrich Rudolf Conrad/1; Under Secretary Castle to Ambassador von Prittwitz, Oct. 21, 1931, *ibid.* /2; Mr. Stimson to Commissioner O'Neill, Oct. 30, 1931, *ibid.* /6; United States Attorney Medalle to Mr. Stimson, Nov. 2, 1931, *ibid.* /7.

The Mexican Ambassador requested on January 21, 1920 that the Secretary of State use his good offices in obtaining from the authority in charge a one month's extension of the provisional arrest and detention of Colonel Agustin Cevallos pending the arrival of additional papers in support of the requisition for his extradition to Mexico, where he was charged with embezzlement of public funds. The Secretary of State replied:

Period may
not be
extended

. . . I beg to recall your attention to the statement contained in my note of January 14, 1920, that the Department of Justice had asked that the matter of furnishing the evidence against Cevallos be brought to your notice with the statement that unless such evidence should be produced in time for transmission to the United States Attorney at Los Angeles for use on January 22, 1920, the Department of Justice would be compelled to abandon the proceedings.

In this relation I may also recall to your attention the provision of Article X of the Extradition Treaty of 1899 between the United States and Mexico that following the provisional arrest of a fugitive, each Government shall endeavor to keep him in safe custody for such time as may be practicable, not exceeding forty days, to await the production of the documents upon which the claim for extradition is founded.

In view of the foregoing, I regret to be obliged to state that I do not see my way clear to requesting the before mentioned extension of time, and that it appears that such request even if made would be unavailing, in view of the above cited attitude of the Department of Justice and the treaty provision mentioned.

Ambassador Bonillas to Secretary Lansing, Jan. 21, 1920, and Mr. Lansing to Señor Bonillas, Feb. 3, 1920, MS. Department of State, file 211.12C83/14.

HEARING

§327

Section 5270 of the Revised Statutes of the United States, 18 U.S.C. §651, provides, in the event of a treaty or convention of extradition between the United States and any foreign state, for the issuance of a warrant for the apprehension of the accused person in order "that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered".

The District Court of the United States for the Northern District of Texas, in speaking of this provision of law, stated:

This statute is the legal authority under which this government moves to carry out its treaty with Mexico. The Congress does not authorize the giving up of the person merely because a foreign state demands. The person found here has the right to have the hearing provided for. That hearing covers at least two

points: (a) The determination of the place of the commission of the alleged offense; and (b) the determination of whether the alleged offense is covered by the terms of the treaty.

In re Lucke, 20 F. Supp. 658, 659 (1937).

The Governor of Texas enclosed with his letter of January 18, 1908 to the Secretary of State a requisition from the Governor of Nuevo León, Mexico, for the extradition of Manuel Saldaña Rodríguez, charged in Mexico with murder. The Secretary of State informed the Governor that—

the papers do not show what proceedings, if any, have been taken in Texas with a view to obtaining the extradition of the fugitive. As you are aware, it is necessary in extradition cases that a judicial hearing should be held before a competent extradition magistrate, and that the latter should issue his commitment for the surrender of the fugitive, before final action can properly be taken by this Department.

The papers are accordingly returned herewith, in order that the necessary preliminary steps may be taken.

On January 31 the Governor sent the following communication to the clerk of the United States District Court at Laredo, Texas:

The Sheriff of Webb County has been instructed to cause the arrest and detention of this party.

Please refer these papers to the United States Commissioner there and arrange for a judicial hearing and if in the judgment of the Commissioner, the fugitive should be detained, please have him issue commitment for the surrender of the fugitive and have him committed to jail to await final action of the Department of State at Washington.

Governor Campbell to Secretary Root, Jan. 18, 1908, and Mr. Root to Mr. Campbell, Jan. 24, 1908, MS. Department of State, file 11322/-1; Mr. Campbell to C. Dart, Jan. 31, 1908, *ibid.* /11-14.

The United States commissioner for the District of Missouri, in a decision in 1908, in the extradition proceedings instituted by the Mexican Government against Frank C. Zimmerman, stated:

Taking all of these facts into consideration, the Commissioner is of the opinion that no preponderance of evidence has been produced to consider the defendant guilty, as contemplated by Article III, of the Treaty Act of Feb. 22, 1899, and the defendant is discharged.

The Acting Secretary of State, in commenting upon the decision to the Attorney General, stated:

It seems reasonable to assume from this either that the Commissioner has expressed his views in very loose language or that he has wholly misapprehended the law on the point involved.

On this latter point it should be observed that the language used seems open to the interpretation that the Commissioner considered it necessary for the demanding Government in this case actually to establish that the accused was guilty of the crime charged. Such a view as this would not only be contrary to the law governing the matter but would not be in accord with the express language of the treaty which provides that the accused shall be surrendered upon the presentation of such evidence as would justify his "apprehension and commitment for trial if the crime or offense had been there (at the place of the hearing) committed".

Not a
trial

Moreover, it is well established by the decisions of our courts that it is not necessary for a demanding government to produce at the preliminary hearing before the extradition magistrate evidence against the accused sufficient to convict him if he were on trial in this country; but that the treaty requirement is met where such evidence is offered as would justify the examining or committing magistrate in this country in holding the accused to answer to an indictment or other proceeding in which he should finally be tried upon the charge made against him.

Decision of Commissioner Colt, MS. Department of State, file 15227/10-12; the Acting Secretary of State (Adee) to the Attorney General (Bona-parte), Oct. 30, 1903, *ibid*.

Samuel Insull, Sr., whose extradition from Greece was requested by the United States, was accorded a hearing, at which time evidence believed to be sufficient to make out a *prima-facie* case of guilt was presented on behalf of the United States. Extradition was refused, apparently on the ground that there was not sufficient proof of criminal intent on the part of the accused. This action led to a formal notice on November 6, 1933 of the denunciation of the treaty of extradition of 1931. 4 Treaties, etc. (Trenwith, 1938) 4290; 47 Stat. 2185. The notice read:

My Government finds it difficult to reconcile this unusual decision with the admission of the competent authorities that the fugitive committed the acts with which he was charged and that these acts are illegal and fraudulent both in the United States and Greece. Without going into the details of the decision, it is evident that the authorities attempted actually to try the case instead of confining themselves to ascertaining whether the evidence submitted by the United States Government was sufficient to justify the fugitive's apprehension and commitment for trial. There can be no doubt that the question of criminal intent referred to by the Hellenic Government would be fairly and judiciously passed upon by the courts in the United States. I am to add that my Government considers the decision utterly untenable and a clear violation of the American-Hellenic Treaty of extradition signed at Athens on May 6, 1931.

Following subsequent negotiations, the Department withdrew the notice of denunciation, and the two Governments, on September 2, 1937, concluded a protocol agreeing upon the following interpretation of article I of the treaty :

The final clause of Article I of the Treaty of Extradition concluded on May 6, 1931, between the United States and Greece, shall, from and after this date, be understood to mean that the court or magistrate considering the request for extradition shall examine only into the question of the sufficiency of the evidence submitted by the demanding Government to justify the apprehension and commitment for trial of the person charged; or in other words, whether the evidence discloses probable cause for believing in the guilt of the person charged. It is further understood that the quoted treaty provisions do not signify that the court or magistrate is authorized to determine the question of the guilt or innocence of the person charged.

The Secretary of State (Hull) to the Minister to Greece (MacVegh), telegram of Nov. 4, 1933, MS. Department of State, file 251.11 Insull, Samuel/198; *Ex. Agree.* Ser. 114; 51 Stat. 357.

Confrontment with witnesses

The provision of the fifth amendment, "that no person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury," applies to persons held for trial in the courts of the United States. If construed to apply to prisoners to be held in extradition proceedings to answer for such crimes in foreign countries, there could be no extradition between the United States and countries where the common law does not prevail. However, in this case there was a judicial inquiry and finding in Italy preliminary to the issuance of the warrant of arrest, substantially like the finding of our grand jury.

So the provision of the sixth amendment, requiring the accused in criminal prosecutions "to be confronted with the witnesses against him," obviously applies to criminal prosecutions tried here, and not to persons extradited for trial under treaties with foreign countries whose laws may be entirely different.

Ex parte La Mantia, 206 Fed. 330, 332 (S.D.N.Y., 1913).

Continuance

The Turkish Embassy, in a note dated October 7, 1913, informed the Secretary of State that the judicial documents which were required for use at the hearing growing out of the request of the Turkish Government for the extradition of Hussein Avni had been sent from Constantinople by mail but that they might not arrive until after the expiration of the time fixed for their production. The good offices of the Department of State were requested with a view to the extension of the time allowed for the presentation of the proofs. The Department took the position that—

the proper procedure to pursue is for the Imperial Ottoman Consul General, or some other person acting for the Ottoman Govern-

ment, to request the extradition magistrate to grant a delay in the proceedings to enable him to produce the necessary documentary evidence.

The Turkish Embassy to the Department of State, Oct. 7, 1913, and the Department of State to the Turkish Ambassador, Oct. 11, 1913, MS. Department of State, file 211.67Ar6/2.

The treaty concluded by the United States and Germany on July 12, 1930 contemplates continuances in extradition proceedings by providing in article X as follows:

The person provisionally arrested shall be released, unless within one month from the date of arrest in Germany, or from the date of commitment in the United States, the formal requisition for surrender with the documentary proofs hereinbefore prescribed be made as aforesaid by the diplomatic agent of the demanding government or, in his absence, by a consular officer thereof. However, each government agrees that, upon the request of the other government, it will address to the competent authorities an application for the extension of the time thus limited so as to allow an additional month.

4 Treaties, etc. (Trenwith, 1938) 4216, 4220; 47 Stat. 1862, 1869.

The Ambassador of Austria-Hungary transmitted to the Department of State certain authenticated papers with a view to obtaining the extradition of Johann Krkovic, who was charged in Austria with certain crimes and who was at that time serving a sentence of two years' imprisonment in Ohio. He was informed:

Introduction
of evidence

In order to obtain the extradition of the accused, proceedings should be had in accordance with the method prescribed in Section 5270 of the Revised Statutes of the United States. The papers accompanying your Excellency's note and which are returned herewith should be translated into English and presented to the extradition magistrate by the appropriate Imperial and Royal Consul or other representative of your Government who may be authorized to act to the end of securing the extradition.

When these requirements of law shall have been met, the Department will be glad to give the case further attention.

Ambassador von Hengervár to Secretary Root, no. 2234, Dec. 27, 1906, and Mr. Root to Ambassador von Hengervár, diplomatic serial 215, Jan. 3, 1907, MS. Department of State, file 3486/1.

Section 5270 of the Revised Statutes of the United States, after providing for a hearing, contains the following provision:

If, on such hearing, he [the extradition magistrate] deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition

Commitment

of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Alias

If the prisoner is the person who committed the crime charged he may be held under an alias for extradition, without any knowledge of his true name.

Ex parte Glucksman, 189 Fed. 1016, 1018 (C.C., S.D.N.Y., 1911).

Specific charge

It was further contended that the magistrate's order of commitment was insufficient, because it adjudged that Collins be held for extradition "for trial on the charges pending against him in the Chief Presidency Magistrate's Court at Bombay"; and that, since he could legally be tried there only on the charge for which he was extradited, the order of commitment must specifically set forth that crime. *United States v. Rauscher*, 119 U.S. 407. The contention is unsound. The order must, of course, be interpreted as limited by the finding therein made, that the evidence produced "justify his commitment on the charge of having obtained property by false pretenses." The certificate which the magistrate issued thereon to the Secretary of State identifies the charge as those set forth in the two new affidavits. By established practice, the warrant of extradition issued by the Secretary of State likewise identifies the crime with which the prisoner has been charged and for the trial of which the prisoner is delivered up. Moreover, it may be assumed that the British Government will not try appellant upon charges other than those upon which the extradition is allowed. *Kelly v. Griffin*, 241 U.S. 6, 15.

Collins v. Loisel, *United States Marshal for the Eastern District of Louisiana*, 262 U.S. 426, 431 (1923).

"It appears from the documents forwarded by you that the Canadian authorities charge the prisoner with the commission of two crimes, namely, forgery and the utterance of a forged check, but your certificate is not definite as to the charge or charges upon which you hold the prisoner for the action of the Secretary of State. The papers are, therefore, returned to you herewith, in order that you may make your certificate more definite and certain." The Solicitor for the Department of State (Johnson) to the commissioner for the District of Indiana (Logan), Dec. 11, 1914, MS. Department of State, file 211.42C86.

Commitment in different jurisdiction

The Swedish Minister requested the extradition of Israel Jansson on the charge of embezzlement. The accused was committed for the action of the Secretary of State. The United States commissioner for the Western District of Pennsylvania, who ordered the commitment, issued an order to the marshal of the Southern District of New York to receive the accused and to keep him safe pending action by the Department of State. When the marshal for the Southern District of New York refused to receive the fugitive, the matter was referred

to the Department of State, and on December 8, 1908 the Acting Secretary of State requested an opinion from the Attorney General on the question whether the United States marshal at New York was right in refusing to hold an extradition prisoner under a warrant issued by a competent authority in another State. The Attorney General replied:

If the marshal at New York had received and held Jansson under the writ issued by Commissioner Shawkey he would not have been acting in pursuance of such an order as the statute provides for, nor in the performance of a duty enjoined by law.

In my opinion the United States marshal at New York was justified, under the circumstances, in refusing to receive and hold Jansson under the writ issued by Commissioner Shawkey.

Minister Lagercrantz to Secretary Root, Nov 7, 1908, MS. Department of State, file 16487/-1; Acting Secretary Adee to Attorney General Bonaparte, Dec. 8, 1908, *ibid* /2; Mr. Bonaparte to Mr. Root, Jan. 4, 1909, *ibid*. /3; 27 Op. Att. Gen. 128, 135 (1909).

The United States commissioner for the Northern District of Illinois, after discharging Osvaldo de Martin de Tomas on the ground that the evidence submitted by the Government of Italy in support of its request for extradition was insufficient to sustain the charge against the accused, transmitted to the Secretary of State the record of the proceedings in the case. The Assistant Secretary of State informed the commissioner as follows:

Transmission
of record

The Statutes of the United States and the practice in extradition proceedings contemplate that the record of proceedings before an Extradition Magistrate shall be forwarded to the Secretary of State only in case the Magistrate shall hold the accused to await the action of the Secretary of State, and in view of this the Department does not consider that it is the appropriate repository of records in cases where the accused has been discharged by the Magistrate.

Commissioner Glass to Secretary Kellogg, Oct. 17, 1927, and Assistant Secretary Castle to Mr. Glass, Oct. 22, 1927, MS. Department of State, file 211 65M36/4.

Following the conclusion of the hearings on the application by the Government of Russia for the extradition of Jan Janov Pouren on charges of murder, attempt to murder, robbery, burglary, and arson—but before the record in the case had been transmitted by the United States commissioner to the Secretary of State—the attorney representing the accused addressed a letter, dated August 25, 1908, to the President which read:

Reopening

Upon behalf of many citizens who have sympathized with the liberal and revolutionary movements in Russia and who believe

that there is danger that a Russian political refugee will be extradited unless you intervene, I write to ask two things:

1. When will you receive a committee that will present the facts to you and explain to you the great interest that many of your citizens take in the case?

2. Will you see that meanwhile and until the matter shall have been disposed of by you no further steps are taken towards the extradition of the refugee?

The case is that of Jan Janoff Pouen, who was arrested in the Southern District of New York in January, on the demand of the Russian Government that he be extradited. The charges against him were common crimes in the District of Riga in the Province of Livland in Russia. The defense did not admit the charges and set up that the crimes alleged were at any rate crimes incidental to the political disturbances in Livland at the time of the Russian Revolution, the period of the alleged crimes being the summer of 1906.

Following the receipt of the record of the proceedings before the commissioner, the Secretary of State, on October 13, 1908, addressed a letter to the United States commissioner informing him that the attorney for the accused charged that the offenses were of a political character; that the Department refused to consider evidence which did not form a part of the record submitted by the committing magistrate; and that, since as to the merits the only defense offered by the accused appeared to be that the offenses with which he was charged were political in character and since extradition for their commission was expressly prohibited by the treaty, the plain intent of the treaty would fail if this evidence were altogether excluded from consideration. It was pointed out that fair play and justice would appear to require that a fugitive in a proper case should be given an opportunity similar to that given to demanding governments to produce further evidence after a decision has been reached in the case. Accordingly, the record was returned to the committing magistrate to the end that he might reopen the case and permit counsel for both parties to offer such further evidence as they might see fit relating to the question of political offenses.

In a memorandum dated October 11, 1908 the Chargé d'Affaires ad interim of Russia stated:

I desire to say in reply to your enquiry as to whether the Russian Government desires to controvert the affidavits there referred to, that the Embassy does not feel called upon to furnish any proof in addition to that already adduced before the Commissioner, even if the very meager time at its disposition permitted it.

The Embassy considers that the Russian Government has complied in all respects with the provisions of the treaty and the statutes of the United States relating to extradition. The case after having been for eight months before the Commissioner, has

been decided by him in favor of my Government's contention, and is now before your Excellency. The Embassy assumes that your review of the decision of the Commissioner will be based upon the evidence submitted in the proceeding before him and that such review cannot be affected by any "ex parte" statements of the prisoner or others, now for the first time submitted. This assumption is based not only upon the universally accepted principles of law, but also upon the precedents and the international comity which prevails in such matters.

When the attorneys for the Russian Government obtained a stay of the rehearing on the ground that the commissioner could not regain jurisdiction, and when the attorneys sought further a writ of prohibition, the Secretary of State, acting under the authority conferred upon him in extradition cases, rendered a decision refusing to issue a warrant of surrender. In notifying the Russian Chargé d'Affaires, it was stated that the proceedings were dismissed without prejudice to the right of the demanding Government to initiate a new proceeding.

Herbert Parsons to President Theodore Roosevelt, Aug. 23, 1908, and Secretary Root to Commissioner Shields, Oct. 13, 1908, MS. Department of State, file 10901, 12-13, the Russian Chargé d'Affaires ad interim (Kroupensky) to Mr. Root, memorandum of Oct. 11, 1908, *ibid.* /44-45; Mr. Root to Mr. Kroupensky, Oct. 23, 1908, *ibid.* /58

It happens not infrequently that an alleged fugitive from justice decides not to resist extradition and waives a hearing. The procedure in the United States in such a situation has been quite uniformly, during recent years, for the extradition magistrate to commit the prisoner to await the action of the Secretary of State and to send to the latter the record of proceedings showing that the waiver was made, whereupon the Secretary of State issues a warrant of surrender. In such cases the demanding government is relieved from responsibility for introducing evidence in support of its application.

Waiver
of hearing

In other cases, after the accused has waived a hearing, the demanding government has moved to dismiss the proceedings, and the accused is released from custody and returns voluntarily. However, in such cases there is no authority to compel the return.

In a few cases of record it appears that after the waiver the extradition magistrate or the marshal has surrendered the accused to an agent of the demanding government. However, there is no authority of law for surrender except by the Secretary of State.

In connection with a request made for the extradition to Mexico of Manuel J. Garcia on charges of embezzlement and falsification of money orders, the Attorney General informed the Secretary of State that the accused had been arraigned and that he wished to waive

further extradition proceedings and to deliver himself voluntarily to Mexican officers. The United States attorney at Bisbee, Arizona, requested instructions. The Secretary of State informed the Attorney General:

. . . Usual course of legal procedure to extradite should be followed in absence of other request from Mexican Government.

Attorney General Wickersham to Secretary Knox, telegram of Oct. 22, 1910, and Mr. Knox to Mr. Wickersham, telegram of Oct. 24, 1910, MS. Department of State, file 211.12G16/5.

The Chargé d'Affaires ad interim of Belgium informed the Department of State in 1911 that Henri Charles Secot, whose extradition had been requested, expressed a willingness to be surrendered, and, in the circumstances, the Chargé d'Affaires requested a warrant of surrender. The Secretary of State replied that—

before the Department can pass on the request for the surrender of the fugitive, it will be necessary for the Belgian Consul at Chicago to present to the appropriate extradition magistrate in Illinois the necessary papers in support of the charge made. If the magistrate commits the accused for extradition, he sends to this Department a transcript of the proceedings had before him. Until such transcript is received here the Department can not act upon the request for the fugitive's surrender. This procedure is followed even where the fugitive expresses a willingness to return to the foreign country for trial.

The Belgian Chargé d'Affaires ad interim (Symon) to the Assistant Secretary of State (Wilson), Sept. 19, 1911, and Mr. Wilson to Mr. Symon, Sept. 22, 1911, MS. Department of State, file 211 55Sc2/1

The German Embassy enclosed with its note, dated April 30, 1910, to the Secretary of State an order of commitment, issued by the United States commissioner for the Southern District of New York in the matter of the application for the extradition of Wilhelm Last and Martin Singer, together with a copy of the complaint made by the German Consul in New York and a copy of the warrant of arrest issued by the United States commissioner. The Secretary of State replied that—

in accordance with the understanding had by telephone on April 30th between the Embassy and the Solicitor's office of this Department, this Government will await the receipt of authenticated testimony in this case.

In a further note dated May 13 from the Ambassador, the attention of the Secretary was drawn to the fact that theretofore a request for a warrant of surrender had been granted by the United States when the accused had admitted his identity and when the certificate of the United

States commissioner, together with a certified copy of the minutes of the proceedings, had accompanied the Embassy's communication. To this the Acting Secretary replied:

In future cases, where the accused party admits identity and consents to return to Germany for trial, and the extradition magistrate commits him for extradition and transmits to the Department a transcript of the proceedings before him, including the complaint, the warrant, and the minutes of the hearing, showing the admission of identity by the accused and his consent to return to Germany, the Department will continue, as heretofore, to issue warrant of surrender. It would not be warranted in doing so, however, in cases like the present, where no copy of the minutes of the hearing is transmitted and the papers contain no admission of identity or consent to return to Germany.

The Secretary of the German Embassy (Von Stumm) to the Secretary of State (Knox), Apr. 30, 1910, and Mr. Knox to the German Ambassador (Von Bernstorff), May 14, 1910, MS. Department of State, file 211.62133/-; Count von Bernstorff to Mr. Knox, May 13, 1910, *ibid.* /1; the Acting Secretary of State (Adee) to the German Chargé d'Affaires (Von Wedel), Aug. 2, 1910, *ibid.* /3.

When the Department of State received information that William F. Walker, whose extradition from Mexico had been requested, would waive extradition proceedings, the following telegram was sent to the American Embassy at Mexico City:

Walker extradition papers now in the course of preparation. Department has been informed that fugitive will waive extradition proceedings and voluntarily surrender himself. If this be so, would Mexican Government permit such action in order to avoid delay incident to formal extradition proceedings, and if so, would the fugitive be surrendered in the same way as if the extradition proceedings had been conducted in the usual manner?

The Ambassador telegraphed in reply:

A brief judicial trial only will be required if Walker will freely return to the States. This is necessary. Foreign Office has telegraphed to Ensenada to ascertain what Walker will do. I will wire you later, if necessary to send formal papers.

The Ambassador again telegraphed on December 27:

Foreign Office now advises me that even though Walker is willing to waive proceedings it is best to have usual papers sent here and that if Walker does not change his mind no more will be required than sufficient to comply with the law which can soon be done.

Secretary Root to Ambassador Thompson, telegram of Dec. 23, 1907, MS. Department of State, file 5485/39; Mr. Thompson to Mr. Root, telegrams of Dec. 24 and 27, 1907, *ibid.* /40 and /43.

Notwithstanding that Hophnia James Greer, whose extradition from Canada on the charge of embezzlement was desired by the Governor of Michigan, waived a hearing and consented to return to Michigan, the formal extradition papers were sent to the American Consulate at Toronto for delivery to the agent appointed to receive the accused. The Consul reported as follows:

I at once communicated with the Police authorities here and am informed that the agent named in the requisition called at that office on the 15th instant and left for Michigan with Greer on the same day, the prisoner having agreed to waive his rights under the law and return voluntarily, as already reported by me. The agent did not call at my office and I was not aware of the prisoner's departure until informed by the Police this morning.

The Police authorities inform me that the requisition papers are not necessary under the circumstances, and I will therefore file them with the correspondence in the case, unless otherwise directed by the Department.

Governor Warner to Secretary Root, telegram of June 12, 1907, MS. Department of State, file 7045; the Chief Clerk (Carr) to the Consul at Toronto (Chilton), June 15, 1907, *ibid.* 7045/2; Mr. Chilton to the Assistant Secretary of State, June 17, 1907, *ibid.* /4.

A demanding government has the right in extradition proceedings to decline to agree to a waiver of extradition by the accused.

The Attorney General (Wickersham) to the Secretary of State (Knox), telegram of Dec. 31, 1912, MS. Department of State, file 212.11M14/5.

Voluntary
return

. . . if the prisoners are willing to go without extradition process, it is believed the British Consul at San Francisco may go before the Commissioner, enter the appropriate motion and have the fugitives discharged from custody, whereupon they could be taken on board boat and transported to New Zealand.

The Secretary of State (Knox) to the British Ambassador (Bryce), telegram of Aug. 17, 1911, MS. Department of State, file 211.41R63/6.

The Ambassador of Great Britain requested on July 30, 1907 the extradition to Canada of Edouard Bernier, charged with murder. He again wrote to the Department of State on September 19, 1907, stating in part:

I have the honor to inform you that the fugitive has now agreed to surrender himself and the proceedings for his extradition have therefore been discontinued.

Ambassador Bryce to Acting Secretary Bacon, July 30, 1907, MS. Department of State, file 7903; Mr. Bryce to Acting Secretary Adey, Sept. 19, 1907, *ibid.* 7903/1.

Pursuant to a request made on November 3, 1909 by the Governor of New York, the American Ambassador at Berlin was instructed to request the provisional arrest and detention, with a view to extradition from Germany, of Martin Kaufman, alias Marvin Kent, charged in the State of New York with forgery. The accused, who was arrested, stated that he desired to return to the United States without extradition. The Secretary of State, in informing the Governor of New York, remarked:

Difficulties
in case of
voluntary
return

Concerning voluntary return of fugitive, Department desires to suggest, for your consideration, the fact that difficulties might be experienced in holding fugitive in countries through which it might be necessary to pass in returning him to America, unless fugitive is formally surrendered under extradition process. Department's experience strongly suggests that Kaufman be formally extradited.

Similar views were set forth by the Minister of Foreign Affairs of Germany in a note addressed to the American Chargé d'Affaires ad interim at Berlin, in which it was stated:

It may, however, be pointed out at this stage that Kaufman would thereby regain absolute liberty, and that it would not be admissible to permit an American detective to influence Kaufman in his freedom in any way whatever in Germany or on board the German steamer. Even for the detective to accompany Kaufman, although the fugitive might agree to this, would be objected to, since in view of the circumstances of the case this accompaniment would involve moral coercion; and this might lead to the detective's rendering himself liable to criminal suit in Germany for duress. In order to avoid any misunderstanding Kaufman would have to be notified of this status of affairs upon his release.

Notwithstanding the views expressed by the Secretary of State and by the Minister of Foreign Affairs of Germany, the accused, following his release, apparently accompanied the detective sent to receive him and returned to the United States.

Governor Hughes to Secretary Knox, telegram of Nov. 3, 1909, and Mr. Knox to the Chargé d'Affaires in Berlin (Hitt), telegram of Nov. 4, 1909, MS. Department of State, file 22193; Mr. Hitt to Mr. Knox, telegram of Nov. 5, 1909, and Mr. Knox to Mr. Hughes, telegram of Nov. 5, 1909, *ibid.* 22193/1; the German Minister of Foreign Affairs (Schoen) to Mr. Hitt, Nov. 13, 1909, and Mr. Hitt to Mr. Knox, Nov. 19, 1909, *ibid.* /8.

In returning to Judge Eldredge of the Thirteenth Judicial Circuit of the State of Illinois, on March 13, 1908, the record of the proceedings had before him in the matter of the proposed extradition to

Reopening

Canada of Adelard E. Lafond, charged in Canada with larceny, the Acting Secretary of State said :

The prisoner has represented to the Department that he was not allowed to offer evidence in his own behalf. Of course the Department knows nothing as to the truth of this statement. The ruling of Mr. Justice Blatchford in *In re Fares*, 7 Blatch. 357, would appear to entitle him to present evidence of this character. In the event of the further examination into the case, it would appear proper to allow the accused an opportunity to furnish such evidence if this has in fact not already been done.

Acting Secretary Bacon to Judge Eldredge, Mar. 13, 1908, MS. Department of State, file 9194/15-16

In 1911 the attorney representing Leyba Gliksmán, whose extradition had been requested by the Ambassador of Russia, sought to have the Secretary of State remit the case to the United States commissioner for a rehearing, it being asserted that the accused had evidence to show that one witness committed perjury when he made a deposition which was used against the accused at the original hearing. The Office of the Solicitor for the Department of State was of the opinion that—

A case of "probable cause" is clearly made out, and the only question in the case appears to be whether the proceedings should be remitted to the Extradition Commissioner to take further evidence. The only instance in which the Secretary of State has ever remitted a case to an extradition commissioner to take further evidence was the case of Jan Pouren in 1908 [*ante*], in which Secretary Root sent the record back to the extradition magistrate, requesting him to take evidence as to the political character of the offense. This seems to have been done upon the theory that the proceedings before the extradition magistrate are in the nature of or analogous to proceedings before a referee.

If it be conceded that the Secretary has the power to remit the case to the magistrate, there would seem to be a very clear distinction between the ground upon which such action was sought in the Pouren case and that upon which the request is based in this case. In the Pouren case the prisoner claimed that the offense was political. In the present case the application is based upon the claim that the evidence introduced by the demanding government was false—in other words, it goes to the merits. This would seem to be a matter for determination by the trial court in Russia.

I recommend that the application of the accused be denied, and that a warrant of surrender be issued.

The recommendation was approved, and a warrant of surrender was transmitted to the *Chargé d'Affaires* of Russia.

Memorandum of the Office of the Solicitor for the Department of State, undated, MS. Department of State, file 211 61L59/4; the Secretary of State

(Knox) to the Russian Chargé d'Affaires (Koudachoff), June 28, 1911, *ibid.* 211.61L59.

George P. Monroe, who was charged with murder in the State of Chihuahua, was extradited to Mexico on January 23, 1912. Shortly thereafter he was released from the Juarez jail by Mexican mutineers and immediately returned to the United States. When his extradition was again requested the matter was referred to the Attorney General, with the statement:

. . . I have the honor to enclose herewith a translation of a note in which the Ambassador of Mexico at this capitol renews his request for Monroe's extradition, and to ask that appropriate instructions be given to the United States Attorney at El Paso to present again to the Extradition Magistrate the documentary evidence upon which the accused was committed for surrender to the Mexican Government, and to take such further measures as may be necessary to secure again the commitment of Monroe.

The Acting Secretary of State to the Attorney General, Feb. 19, 1912, MS. Department of State, file 211.12M75/13.

While it is a general rule that persons whose extradition from the United States has been requested by a foreign government are not permitted to establish an alibi at the hearing, the Department of State nevertheless may in an appropriate case return the record of proceedings to the commissioner before whom the hearing was had with a direction that the case be reopened in order to permit counsel for the accused as well as counsel for the demanding government to offer further evidence to establish or to refute the identity of the accused person. Such action was taken in connection with the application for the extradition of Louis D. Merrion to Canada.

Assistant Secretary Osborne to Commissioner Hayes, May 4, 1916, MS. Department of State, file 211.42M55/6.

The United States commissioner at Detroit informed the Acting Secretary of State that, owing to the illness of the attorney for the Canadian Government, the hearing on a motion for re-determination in the extradition case instituted against Martin Powell had been adjourned to September 1, 1913. The Secretary of State replied:

. . . Is the Department to understand that two weeks after you have committed the accused for extradition, and after your commitment has been sustained by the United States District Court and the United States Circuit Court of Appeals, you have undertaken, on the petition of the accused, to reopen the case and reassert jurisdiction over it? The Department holds that you have no jurisdiction thus to proceed on the petition of the accused, and will treat as final the record now in its possession.

The commissioner stated :

. . . in reply would respectfully state, that when notice of a motion for a "re-determination" was served on me by the attorneys for the respondent, I told the gentlemen that I had no jurisdiction in the matter, but felt that out of courtesy to the Canadian Government, I would notify its representative here, Ormand F. Hunt, Esq., to be present at the hearing of the motion.

I have never thought I had any jurisdiction in the matter, and was prepared to deny the motion.

Commissioner Willcox to Acting Secretary Moore, telegram of Aug. 6, 1913, and Secretary Bryan to Mr. Willcox, telegram of Aug. 7, 1913, MS. Department of State, file 211.42P87/9; Mr. Willcox to Mr. Bryan, Aug. 9, 1913, *ibid.* /12.

EVIDENCE

DOCUMENTARY PROOF

§328

Treaty provisions

Treaties of extradition to which the United States is a party usually contain a provision regarding evidence of criminality similar to that contained in article I of the treaty concluded on July 12, 1930 with Germany (4 Treaties, etc. [Trenwith, 1938] 4216; 47 Stat. 1862, 1863), reading:

. . . surrender shall take place only upon such evidence of criminality, as according to the laws of the place where the fugitive or person so charged shall be found, would justify his commitment for trial if the crime or offense had been there committed.

Statutory provisions

Evidence within the meaning of such a provision may be oral or written. If it is written, e.g. depositions, affidavits, and warrants, it must, in accordance with the provisions of section 5271 of the Revised Statutes, as amended (22 Stat. 215, 216; 18 U. S. C. §655), be properly authenticated.

Concerning the proof required to be produced by the demanding government to establish the commission of the crime charged within its jurisdiction, the United States Circuit Court of Appeals for the Fourth Circuit said:

It is contended in behalf of petitioner that he should be discharged because all of the evidence offered to show the commission of the crimes whereof he stands charged was by deposition. The argument is that while the depositions would be admissible under Rev. St. §5271 (18 USCA §655), to connect the defendant with a crime shown to have been committed in a foreign country, the fact that the crime was committed in such foreign country must

be established aliunde. We cannot accept such a distinction. The statute in question provides:

"Evidence on hearing. In all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under this chapter, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies thereof, so offered, are authenticated in the manner required."

There is nothing in the language of this section which would justify the distinction urged upon us. On the contrary, it expressly provides that depositions "shall be received and admitted as evidence on such hearing for all the purposes of such hearing"; and, of course, one of the purposes of the hearing is to determine whether there is reasonable ground to believe that the accused is guilty of the crime. To hold that it is incumbent upon the foreign government to produce witnesses to show that the crime was committed within its territory would circumscribe the operation of the statute without reason and would defeat the very purpose for which it was enacted.

Collier, United States Marshal v. Vaccaro, 51 F. (2d) 17, 20 (1931).

The Under Secretary of State, in replying to the Ambassador of Spain regarding the proposed extradition of José Gonzalez Flores, Jesús Raja Martinez, and Jorge Antich Caballero, stated:

With reference to the enclosures with your note, which, as indicated, were referred to as the papers needed for the extradition of the accused, it may be pointed out that a translation of those papers seems to show that they are the indictment and warrant of arrest issued against the fugitives. In this relation attention may be called to the fact that Article XI of the Extradition Treaty of 1904 between the United States and Spain provides in part as follows:

"If, however, the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued shall be produced, with such other evidence or proof as may be deemed competent in the case."

The papers which were transmitted do not seem to contain depositions or other evidence as to the criminality of the accused.

Under Secretary Grew to Ambassador Riaño, Apr. 10, 1925, MS. Department of State, file 211.52 F 66/3.

The Governor of Minnesota inquired of the Secretary of State whether a person, then an inmate of a penal institution at Toronto, Convicted persons

Canada, who had escaped from the State penitentiary at Stillwater, Minnesota, following conviction of a felony, could be extradited. It was stated that the person was charged with the crime of escape from custody, but, as that was not a crime specifically enumerated in the treaty between the United States and Great Britain, inquiry was made whether extradition could be requested on the basis of the charge for which the man was convicted. He was told that—

escapes are not included in our treaties of extradition as extraditable offenses. If, however, the crime of which the fugitive was convicted is included in any one of the treaties of extradition between the United States and Great Britain, . . . the surrender of the fugitive can be obtained upon the expiration of the term he is serving in Canada, for the treaty provisions will be seen to apply not only to those who have been accused, but also to those who have been convicted of crime.

Governor Johnson to Secretary Root, May 9, 1907, and Acting Secretary Bacon to Mr. Johnson, May 15, 1907, MS. Department of State, file 6431.

Conviction
in absentia

Since it appears from the enclosures with the Minister's note that all of the convictions of the fugitive set forth therein were rendered in the absence of the defendant, it may be further pointed out that so far at least as the United States is concerned, persons so convicted are treated in extradition proceedings as persons charged with and not convicted of crime. Therefore, in such cases it would be necessary to supply the evidence referred to in Article XI of the extradition treaty signed as between the United States and Greece with reference to persons *charged with* crime.

The Secretary of State to the Minister of Greece, May 20, 1931, MS. Department of State, file 211.68 Theodorí, Anastassious/4.

One who has been convicted *in contumaciam* in foreign countries is to be regarded not as convicted of, but only charged with, the offense.

Ex parte Fudera, 162 Fed. 591, 592 (C.C., S.D.N.Y., 1908).

Failure to produce before the extradition magistrate a certified copy of the requisition of the demanding government addressed to the Secretary of State is nothing more than a technical defect which is overcome by the production of the requisition at the hearing on the petition of the accused for a writ of *habeas corpus*.

In re Urzua, 188 Fed. 540, 541 (C.C., S.D.N.Y., 1911).

Charles Glen Collins, whose extradition from the United States to India was requested by the British Government, sought release on the ground that the evidence introduced against him was wholly inadmis-

sible. The Supreme Court of the United States, in passing on the contention, said:

Collins contends that the evidence introduced was wholly inadmissible. That particularly objected to on this ground is the warrant of arrest and copies of *prima facie* proceedings in the Court of the Chief Presidency Magistrate, Bombay, which accompanied the affidavit of the British Consul General. The Consul General for the United States in Calcutta had certified that these papers proposed to be used upon an application for the extradition of Collins "charged with the crime of obtaining valuable property by false pretenses alleged to have been committed in Bombay" were "properly and legally authenticated so as to entitle them to be received in evidence for similar purposes by the tribunals of British India, as required by the Act of Congress of August 3, 1882." That act, c. 378, §5, 22 Stat. 215, 216, declares that "depositions, warrants, and other papers, or the copies thereof" so authenticated, shall be received and admitted as evidence for all purposes on hearings of an extradition case, if they bear "the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country". One argument of Collins is that the admissibility of evidence is determined, not by the above provision of the Act of 1882, but by §5271 of the Revised Statutes, which provided only that copies of foreign depositions shall be admitted when "attested upon the oath of the party producing them to be true copies," and which did not provide for the admission of "warrants or other papers"; and that, on these grounds, copies both of the Indian documents and of certain London depositions should have been excluded; since neither the Consul General at Calcutta, the Secretary of the Embassy at London, nor the British Consul General at New Orleans, could attest that the papers were true copies. But §6 of the Act of 1882 expressly provides for the repeal of so much of §5271 as is inconsistent with earlier provisions of that act; and under §5 thereof the admissibility of papers is not so restricted.

Warrant
of arrest

Collins v. Loisel, United States Marshal for the Eastern District of Louisiana, 259 U.S. 309, 312-314 (1922).

As to issuing of a warrant of arrest as a prerequisite to a requisition, it is not necessary to discuss section 5270 of the Revised Statutes (U.S. Comp. St. 1901, p. 3591), nor *Grin v. Shine*, 187 U.S. 181, 23 Sup. Ct. 98, 47 L. Ed. 130. The depositions from Mexico, properly authenticated, state that:

"Sufficient evidence having been forthcoming to proceed against Roberto Urzua as the presumed slayer of Jose Ruesga, in accordance with articles 244, 245 and 246, subsec. 4, of the Code of Penal Procedure, let the order be issued from headquarters. The judge of the Third criminal district so decrees. . . ."

This was sufficient proof of the issuance of a warrant of arrest. The days when federal courts were astute to defeat requisitions, where the evidence indicated quite clearly that an extraditable offense had been committed, on highly technical grounds, have long

since passed, and the earlier authorities on the procedure in extradition are not as persuasive as they once were.

In re Urzua, 188 Fed. 540, 541 (C.C., S.D.N.Y., 1911).

Following a hearing accorded Lister J. Bradshaw, whose extradition from Australia to the United States was requested in 1921, the accused was ordered discharged on a writ of *habeas corpus*, the judge holding that the extradition papers were defective in that they contained only a copy of the warrant of arrest issued in California rather than the original warrant of arrest. The Secretary of State sent the following instruction to the Consul at Sydney:

According to Department's information, ground assigned for decision discharging Bradshaw does not accord with requirements in other countries. Copy warrant in papers certified by clerk of appropriate county under seal, and signature, seal, and official character of clerk certified by Secretary of State, California, under seal, which in turn is authenticated by this Department.

Advise appropriate authorities of foregoing, and telegraph briefly present status of case.

The opinion of the court so far as it relates to this question reads:

... Then it brings me to the last ground; that no foreign warrant authorized the arrest of the accused ... duly authenticated was produced to the Magistrate. It has been contended that a copy of the warrant is sufficient, and it has been admitted that the only document attached to the papers is a copy of a warrant which was issued in the State of California. This copy, moreover, is not signed, but has merely a typewritten name placed upon it, nor has it any seal of a Minister for Justice or other Minister of State. Section 10 of the Act provides that in the case of a fugitive criminal, accused of an extradition crime if the foreign warrant authorizing the arrest of such criminal is duly [duly] authenticated etc. ... the police magistrate may commit him to prison.

From the reading of that Section, it appears as if the original foreign warrant must be before the magistrate. Section 15 provides that foreign warrants shall be deemed to be duly authenticated if they purport to be signed by a judge, magistrate or officer of the foreign state where the same is issued, and if they are also authenticated by the oath of some witness. As I have said in this case, the warrant is not signed at all, but to a certain extent it is authenticated by the oath of Mr. Veale. The question however with me is, can the copy of the original warrant be sufficient to give jurisdiction to commit. Sub-section 1 of Section 15 refers to the warrant. Sub-section 2 deals with the depositions of statements or copies thereof; and it is noticeable that the word "copies" is not used in regard to the warrant. Section 15 itself provides that foreign warrants and depositions of statements on oath and copies thereof, shall be deemed to be duly authenticated etc. ... And it might be argued that the word "copies" refers to the foreign

warrant as well as to the deposition of a statement on oath. I do not think this contention is correct, particularly as in the case of Ganz and in the case of Coppin, no reliance was placed on this argument. . . . I am bound to say that I do not think that a copy of a warrant can be used even if the copy of the warrant produced duly authenticated, so that the applicant must succeed on his first ground, and I order that the writ of habeas corpus issue, and that the applicant be discharged.

The Governor of California (Stephens) to the Acting Secretary of State (Davis), Jan. 21, 1921, MS. Department of State, file 247.11B72; the Secretary of State (Hughes) to the Consul at Sydney (Norton), May 5, 1921, *ibid.* 247.11B72/9; Mr. Norton to Mr. Hughes, no. 340, May 5, 1921, *ibid.* /21.

Action identical with that taken in the Bradshaw case was taken by the extradition magistrate at Sydney in connection with the proposed extradition to the United States of Frank Herbert Gay. When informed of the possibility that such action would be taken, the Secretary of State instructed the Consul at Sydney in 1935:

Treaty does not contemplate that hearing shall be dependent upon presence of agent with proper warrant to receive surrender of fugitive. If you have made formal application to appropriate authorities for surrender of Gay as directed in Department's instruction March thirtieth with which properly certified set of papers was enclosed extradition magistrate who has been designated should be in a position to hear case.

The Consul replied:

. . . I have discussed matter at length with crown solicitor . . . [who] would have charge of case.

He states firstly, magistrate will be in duty bound to follow decision Justice James in Bradshaw case requiring original warrant, for which see Despatch #340, May 5, 1921, Consul Norton, Sydney; secondly, that while escort's presence at hearing is not absolutely essential, it is extremely advisable in order to avoid risk of failure; thirdly, that original warrant must be authenticated as provided section 15, extradition act (?) 1870 namely either by oath of competing [*competent*] witness such as escort or by being sealed with official seal Minister of Justice or some other minister of state.

The original warrant was obtained and transmitted to the Consul at Sydney, and in due course Gay was extradited. Thereafter, the Consul General at Sydney was instructed as follows:

. . . Inasmuch as extradition in Australia is governed by the Commonwealth Extradition Act of 1903, which provides inter alia that the British Extradition Act of 1870 and subsequent amendments shall be in force throughout the Commonwealth, the Department cannot understand the basis for the decision by Justice James in the Bradshaw case as it is contrary to the existing practice

in Great Britain. A number of the cases involving extradition from Great Britain have been examined and without exception the extradition documents forwarded in connection therewith have never contained the original warrant of arrest issued in this country. In each instance a certified copy of such warrant has been accepted, apparently as a compliance with the provisions of the British Extradition Act.

In view of the foregoing you are instructed to take up the matter with the appropriate Australian authorities and inquire whether it will be possible to modify the present practice in Australia which requires the production of the original warrant of arrest. No doubt the Australian authorities could obtain through the British Colonial Office a statement from the appropriate British authorities showing the existing practice in extradition cases.

The Consul General reported as follows on March 3, 1936:

The Department of External Affairs states that advice has been received from the Dominions Office that the question was reconsidered in consultation with the Chief Magistrate at Bow Street Police Court, and it had been considered that the effect of the decision in *R. v. Ganz* (9.Q.B.D.93) was that a copy of the Warrant of Arrest might be accepted, provided it was duly certified.

Later, the Consul General, after discussing the matter with the Assistant Crown Solicitor of the State of New South Wales, reported:

The present incumbent of this office, Mr. A. W. B. Barry, stated that the Crown Solicitor's Office had received a letter from the Department of External Affairs, Canberra, dated February 18, 1936, containing the same information as that in the letter from the Department of External Affairs to this Consulate General, a copy of which was forwarded to the Department with my despatch of March 3, 1936. Mr. Barry explained that the question whether the original copy of a warrant was essential or whether a duly certified copy was sufficient was a judicial and not an administrative one. The matter would be decided not by the Crown Solicitor's Office, but by the Court. . . .

Mr. Barry pointed out that while there was no certainty that a Magistrate would feel bound to follow the Bradshaw decision as against the practice mentioned in the communication from the Dominions Office of accepting a duly certified copy of the warrant, it was, nevertheless, the duty of the Crown Solicitor's Office in preparing applications for extradition to anticipate any and all objections or arguments that might be raised on behalf of the fugitive and that the Crown Solicitor's Office would be obliged to bear in mind the possibility of a ruling by a New South Wales Magistrate that he was bound by the decision in the Bradshaw case. He had suggested, therefore, in his acknowledgment to the Department of External Affairs that the possibility of amending the Extradition Act in such manner as to remove all doubt be taken up with the Dominions Office. He had not as yet received a reply, but stated that he would inform this office as soon as any definite information was received.

It does not appear from the records of the Department whether the amendment was made.

The Secretary of State (Hull) to the Consul at Sydney (Doyle), June 5, 1935, MS. Department of State, file 247.11 Gay, Frank Herbert/25; Mr. Doyle to Mr. Hull, June 14, 1935, *ibid.* /26; the Assistant Secretary of State (Moore) to the Consul General at Sydney (Moffat), Aug. 16, 1935, *ibid.* /38; Mr. Moffat to Mr. Hull, no. 148, Mar. 3, 1936, *ibid.* /55; Mr. Moffat to Mr. Hull, no. 213, June 3, 1936, *ibid.* /57.

The Consul General at Montreal, Canada, reported to the Department of State as follows regarding the extradition to the United States of Henry A. Porter: Proof of law

If extradition proceeds Judge Choquet says must have affidavit by the attorney quoting the law under which Porter has been indicted before grand jury; said affidavit to be sworn to before the clerk of court and certified by him under seal of court.

The Department of State informed him that—

In cases where the facts adduced by the evidence prove a crime which is included in the treaty of extradition, and which is unquestionably punished by the laws of both countries, it would seem that a specification of the law is superfluous. If, on the other hand, there is some special reason for the requirement in this case, the Department would be glad to be advised thereof.

To this the Consul General replied:

While the extradition treaty provides that the offence must be one against the laws of both countries, and while there is no clause in the treaty requiring proof, yet in cases before the Judge, he has always held that if it is demanded, as has usually been the case, the law should be proven by affidavit or oath of the officer sent with papers. In this case as there was no officer sent with papers, he feared delay unless an affidavit were produced.

The Consul General at Montreal (Bradley) to the Assistant Secretary of State (Bacon), Dec. 13, 1907, MS. Department of State, file 10129/8; the Chief Clerk of the Department of State (Carr) to Mr. Bradley, Dec. 19, 1907, *ibid.* /9; Mr. Bradley to Mr. Bacon, Dec. 24, 1907, *ibid.* /14.

When, on January 11, 1907, the Governor of California requested the provisional arrest and detention with a view to extradition from Mexico of Raymande Garcia, charged in California with murder, the Acting Secretary of State replied: *Corpus delicti*

... the Department immediately instructed the American Ambassador to Mexico, by telegraph, to request the provisional arrest and detention of the fugitive.

I enclose herewith for transmission to the prosecuting authorities by whom the formal papers are being prepared, copies of circulars relating to procedure in extradition cases with Mexico,

in which it will be noted that a particular kind and degree of proof must be submitted, in order to establish the *corpus delicti* of homicide.

The principal circular referred to was one dated April 10, 1900, prepared by the Mexican Ambassador in Washington, which read:

2. The *corpus delicti* of homicide in cases of a person not yet sentenced must be established by ocular inspection of the corpse and by medical testimony. If scientific evidence cannot be had, upon their impracticability being set forth, the testimony of reliable persons (experts to be preferred) or other proper evidence may be produced.

3. The general rule shall always be that, in order to prove the existence of the *corpus delicti*, which is a requisite for the arrest and commitment for trial of a person charged with the crime or offense, the best evidence the nature of the case admits of shall be presented, if possible to be had; but if not possible, then the best that can be had may be allowed.

4. The testimony of witnesses under fourteen years or of other disqualified persons will not be admitted, unless the circumstances of the case show that better evidence cannot be had.

5. Each witness must explain satisfactorily the manner in which the facts asserted by him or [*sic*] came to his or her knowledge.

Governor Gillett to Secretary Root, telegram of Jan. 11, 1907, and Acting Secretary Bacon to Mr. Gillett, Jan. 12, 1907, MS. Department of State, file 3786; memorandum from Ambassador Aspiroz, Apr. 9, 1900, MS. Department of State, 47 Notes from Mexico.

Ex parte
statements

John Bingham sought to resist extradition to Canada on the ground that the evidence presented by the demanding Government consisted entirely of statements taken *ex parte* in the absence of the accused and without opportunity for cross-examination. The Supreme Court, in holding that this was not required, stated:

. . . The Treaty of 1842 provides in Article X that extradition shall only be had "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had been there committed." Section 5271, Rev. Stat., as amended by Act of August 3, 1882, §§5 and 6 (c. 378, 22 Stat. 215, 216), provides that any depositions, warrants, or other papers or copies thereof shall be admissible in evidence at the hearing if properly authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country, and that the certificate of the proper diplomatic or consular officer of the United States resident in the foreign country shall be proof of such authentication. The Montreal affidavits, complaints, warrant, etc., are properly authenticated in accordance with this provision. It is one of the objects of §5271 to obviate the necessity of confronting the accused with the witnesses against him; and a construction of this section, or of the

treaty, that would require the demanding government to send its citizens to another country to institute legal proceedings would defeat the whole object of the treaty. *Rice v. Ames*, 180 U.S. 371, 375; *Yordi v. Nolte*, 215 U.S. 227, 231.

Bingham v. Bradley, United States Marshal for the Northern District of Illinois, 241 U.S. 511, 517 (1916).

In connection with *habeas-corpus* proceedings brought by Arthur J. Klein to obtain his release from commitment in extradition, a question was raised concerning the hearsay character of certain evidence submitted on behalf of the British Government. The United States Circuit Court of Appeals for the Second Circuit said:

Hearsay
evidence

The hearsay character of a statement is of course a factor to be considered in determining the weight to be accorded it, but that is as far as the hearsay objection goes in a proceeding like the present. See *Collins v. Loisel*, 259 U.S. 309, 317, 42 S. Ct. 469, 66 L. Ed. 956; 1 Wigmore, *Evidence* (2d Ed.) p. 21.

United States ex rel. Klein v. Mulligan, Acting United States Marshal, 50 F. (2d) 687, 688 (1931).

The Under Secretary of State in a letter directing the sheriff of Webb County, Texas, to release Rosalio Meza, who had been held for extradition to Mexico, stated that—

the Department has concluded that the extradition cannot be granted for the reasons that the papers do not contain evidence as to their authentication which would render them admissible in this country and that the evidence concerning the connection of the accused with the crime charged is entirely hearsay in character.

The Under Secretary of State (Clark) to the sheriff of Webb County, Tex., Feb. 13, 1929, MS. Department of State, file 211.12 Meza, Rosalio/7.

In the case of *Elias v. Ramirez*, the Supreme Court of the United States upheld the admission in evidence of unsworn statements included with sworn depositions which had been authenticated by the principal American diplomatic or consular officer in the demanding state. The court said:

Unsworn
statements

It is further contended that the statements of Rosas and Enriquez were unsworn to, and because unsworn to were not admissible in evidence; that "under the common law and the law of Arizona the unsworn statement of no witness is competent upon a preliminary hearing before a committing magistrate," and would not justify a commitment for trial in Arizona. It is hence contended that it was not sufficient to justify the extradition of the appellee. *In re Egita*, 63 Fed. Rep. 972; *In re McPhum*, 30 Fed. Rep. 57; *Benson v. McMahon*, 127 U.S. 457, are adduced to

sustain the contention. The answer to the contention is that the statute providing for extradition makes the depositions receivable in evidence and provides that their sufficiency to establish the crime shall be such as to create a probability of the commission by the accused of the crime charged against him. This is the principle announced by the cases cited by the appellee.

215 U.S. 398, 409 (1910).

The United States District Court for the Southern District of New York said that the fact that the statements of foreign witnesses are merely signed and not sworn to does not make such statements inadmissible as evidence in extradition proceedings when they are properly authenticated and duly certified.

President of the United States, ex rel. Caputo v. Kelly, Marshal, et al.,
19 F. Supp. 730, 737 (1937).

Statements
by accomplices

Joseph Carrero, or Curreri, whose extradition on a charge of murder was requested by the Government of Canada, sought to obtain release through *habeas-corpus* proceedings, alleging, *inter alia*, that the demanding government had not submitted the degree of proof necessary to hold the defendant to answer for such a crime in the courts of California. It was urged that the only evidence submitted was that of an accomplice and that that evidence had not been corroborated. The Circuit Court of Appeals for the Ninth Circuit stated:

Appellant argues that, in order to establish this degree of proof necessary to holding the defendant to answer for the crime of murder in the courts of California, the evidence must be competent, and contends that the evidence of an accomplice is incompetent for that purpose. It is clear, however, that the evidence of an accomplice is competent evidence under the law of California. The requirement that his testimony shall be corroborated necessarily implies that it is competent and merely goes to the sufficiency or weight of the evidence standing alone to convict.

Counsel's further argument proceeds on the theory that the evidence of the accomplice being incompetent, such evidence cannot make out a *prima facie* case because, as defined by the Code of Civil Procedure of California, "*prima facie* evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence," Cal. Code Civ. Proc., § 1833. Appellant adds, "in all cases, civil or criminal, it has been said that a *prima facie* case is one which will support a judgment unless other evidence is introduced, and further, a state of facts which entitles the state to have the case go to the jury."

. . . In reply to this argument, it is sufficient to say that the statutory law of California, which is controlling here, with reference to the holding of persons for trial by a committing magistrate, does not require in terms that there should be a *prima facie* showing of guilt, but requires a person to be held if there

is "sufficient cause to believe" him guilty. It is clear that the testimony of an accomplice is, next to the confession of the defendant, the most satisfactory kind of evidence that can be produced as to the guilt of the defendant. The doubt in such a case is as to the veracity of the witness. In the federal courts the weight of the testimony of the accomplice is left to the jury, but in some states, like California, such evidence, without other evidence connecting the defendant with the offense, is insufficient for conviction; that is to say, in the opinion of the Legislature it is insufficient to establish the guilt of the defendant beyond a reasonable doubt. We are not without authority in California as to the distinction between evidence which is sufficient to support an order committing the defendant for trial and evidence which is sufficient to sustain a conviction of a crime. In *People v. Cokahnour*, 120 Cal. 253, 52 P. 505, no evidence was introduced before the committing magistrate other than the confession of the defendant. This evidence, under the law of California, was insufficient to sustain a conviction and required corroboration as to the corpus delicti. 8 Cal. Juris., p. 118, §207 Cal. Jur.; *People v. Ford*, 25 Cal. App. 388, 143 P. 1075. Yet the California Supreme Court said: "This was competent and sufficient evidence upon which to hold him to answer." This decision was relied upon by the Appellate Court of the Second Appellate District of California in *Re Alexis M. Schwitalla*, 36 Cal. App. 511, 172 P. 617, 618, wherein the court held as follows: "While a defendant cannot be convicted upon the uncorroborated testimony of an accomplice, the testimony of an accomplice is admissible and is proper to be considered, and we think is sufficient to make it appear that there is a 'probability' that a defendant has been guilty of the offense charged against him."

Curreri v. Vice, United States Marshal et al., 77 F. (2d) 130, 131 (1935).

A deposition of the wife of the accused was admitted against him in the hearing accorded to Karl Johan Johansson-Heden, whose extradition had been requested by the Government of Sweden. Record of Proceedings in the Matter of the Extradition of Karl Johan Johansson-Heden, p. 7, MS. Department of State, file 211.53J59/1.

The Governor of South Dakota transmitted to the Secretary of State an application for the extradition from Canada of B. E. Beers and E. R. Trippe, charged with obtaining money and property by false pretenses. The Acting Secretary of State returned the documents, stating:

Testimony
taken before
grand jury

I return the papers herewith as it is feared that the evidence furnished, which consists of the record of the testimony taken before the Grand Jury which indicted the fugitives, might not be received by the magistrate before whom the extradition proceedings may be brought in Canada. Furthermore, it is feared that the evidence submitted is not sufficiently strong to place beyond doubt the granting of the extraditions. Under the treaty with Great Britain it is provided that fugitives from justice shall be surrendered by one country to the other only upon such evi-

dence of criminality as would justify their apprehension and commitment for trial if the crime or offense had been committed in the place where they are found.

Governor Vessey to Secretary Knox, Aug. 6, 1909, and Acting Secretary Adeo to Mr. Vessey, Aug. 9, 1909, MS. Department of State, file 20941/-2.

Original
documents

The Ambassador of Great Britain, in a note dated December 21, 1915, requested the Secretary of State to return certain original papers and exhibits which had been submitted at the hearing in the matter of the extradition to Canada of Mike Meyers. The Secretary of State returned the papers, stating that—

the documents which are herewith enclosed, pursuant to your request, are properly a part of the Department's record in the extradition case of Mike Meyers, and . . . in order to comply with your request it has been deemed necessary to have photographic copies made of such documents for retention in the Department's files.

I therefore venture to suggest that the Canadian authorities be reminded of the inadvisability of presenting to extradition commissioners in the United States original papers and exhibits which may be needed upon the trial of fugitives returned to Canada. It would appear that ordinarily duly authenticated copies of such papers and exhibits would serve the same purpose in extradition proceedings as the originals thereof.

Ambassador Spring Rice to Secretary Lansing, Dec. 21, 1915, and Mr. Lansing to Mr. Spring Rice, Dec. 24, 1915, MS. Department of State, file 211.42M57/2.

CERTIFICATION AND AUTHENTICATION

§329

Extradition
from U.S.

Section 5271 of the Revised Statutes of the United States, 18 U.S.C. §655, provides for the reception as evidence in extradition proceedings of depositions, warrants, and other papers, or copies thereof, if they are properly and legally authenticated so as to entitle them to be received for similar purposes in the demanding country. The expression "for similar purposes" has been construed to mean as evidence of criminality.

Ex parte La Mantia, 206 Fed. 330, 331 (D.C., S.D.N.Y., 1913).

The Department of State has prepared a form of certificate to be attached by diplomatic and consular officers of the United States in the demanding state in making the authentication provided for in the statute. This form of certificate, known as "Form 36—Consular", has been tested by actual use and found to be legally sufficient. The certificate, when attached at a diplomatic mission, must be signed by the ambassador, minister, or chargé d'affaires, as the case may be.

If the certificate is attached at a consulate, it should be signed by the senior officer of the particular district.

FORM 36

(Place and date) _____ of the United States of
 (name of officer) (title of officer) _____
 America at _____, hereby certify that the annexed papers,
 (name of place) _____
 being _____ proposed to be used upon an application for the
 (state what papers are) _____
 extradition from the United States of _____, charged with
 (name of fugitive) _____
 the crime of _____ alleged to have been committed
 (treaty designation) _____
 in _____, are properly and legally authenticated so as to
 (name of place) _____
 entitle them to be received in evidence for similar purposes by the tribunals
 of _____, as required by the Act of Congress of August 3,
 (name of country) _____
 1882.

In witness whereof I hereunto sign my name and cause my seal of office
 to be affixed this _____ day of _____, 19____.

of the
 United States of America

Heinrich Zentner, whose extradition to Germany was sought, petitioned for a writ of *habeas corpus*, alleging, among other things, that the translation of the documentary evidence introduced against him was not attested by the person who typed the translation. The United States District Court for Massachusetts said with respect to this contention:

"Certain depositions accompanied by papers or copies of papers therein referred to, all in the German language, purporting to be properly and legally authenticated, so as to entitle them to be received by the German tribunals as evidence of Zentner's criminality, were introduced before the commissioner. They form part of his record, as does also what purports to be an English translation of them. The authentication of the papers themselves is not questioned. The translation was typewritten. The translator testified before the commissioner that he had dictated the translation to a typewriter, that he had examined and compared it as written out by her, and that it is correct. The petitioner objects that the typewriter did not also testify with reference to it. But he has not claimed that the translation is in any respect inaccurate, although the German original, as the commissioner has certified, was read to him in open court. I agree with the commissioner's ruling that he was warranted in accepting the translation as correct without any evidence from the typewriter." *Ex parte Zentner*, 188 Fed. 344, 347 (1910).

It is claimed that the depositions offered and received by the commissioner are not properly authenticated, and should not have been received. While it may be doubted whether this contention can be reviewed on *habeas corpus*, it is nevertheless conceded that the consular authentication affixed to the copies of the depositions is in the precise form required by the statute. Section 5, 22 Stats. at Large, 216; Act Aug. 3, 1882. Counsel contends that although this act amending section 5271, U.S. Stats., as it originally stood,

repealed said last-named section only so far as it was inconsistent therewith, yet the original clause of such section requiring the copies of depositions to be attested "upon the oath of the party producing them to be true copies of the original depositions" has not been eliminated from the required method of procedure in the admission of evidence in extradition cases. It seems to me that the amending act was clearly designed to prescribe a single test of admissibility of evidence in proceedings in this country, and it certainly by its clear language eliminated the clause relating to attesting copies of depositions when it provided that such depositions "or the copies thereof" shall be received when authenticated by the certificate, etc., of the principal diplomatic officer. In other words, the amending statute intended to make the consular certificate the final and controlling guide in determining the admissibility of testimony before the extradition commissioner. When the documentary evidence has been authenticated as required by the statute, it is admissible, leaving to the commissioner merely the question of determining the sufficiency of the evidence therein contained. *Elias v. Ramirez*, 215 U.S. 398, 30 Sup. Ct. 131, 54 L. Ed. 253.

Ex parte Schorer, 197 Fed 67, 72 (D C, ED Wis, 1912)

No question was raised as to the sufficiency of the affidavit or complaint which was the beginning of the last instituted extradition proceeding. It was contended that the depositions and other documents which were transmitted from Chile and received in evidence on the hearing which resulted in the order committing the appellants for extradition were not so authenticated as to entitle them to be considered. Attached to the documents mentioned was a certificate which was subscribed by John F. Martin, chargé d'affaires ad interim (who was shown to be the principal diplomatic or consular officer of the United States then resident in Chile), and certified:

"That the Honorable William Miller Collier, the duly accredited ambassador from the United States of America to the republic of Chile, is absent on leave and is now in the United States of America; that in his absence I am chargé d'affaires ad interim of the United States at Santiago, republic of Chile, duly accredited as such from the United States of America, and am the principal diplomatic agent of the United States of America resident in the republic of Chile at this time; that the attached papers regarding the extradition of Gabriel Voloshin Boduar and Eugenia Bolshago Smirnowa, duly certified by the authorities of the republic of Chile, are authenticated in such manner as would entitle them to be received in the tribunals of the republic of Chile for the purpose of showing the criminality of the above-named persons, from which country the said persons have escaped."

The quoted certificate was made by an official designated by the statute, and literally complies with the requirement of the statute in reference to such a certificate. The sufficiency of the authen-

tication to make the certified documents receivable in evidence on the hearing in the extradition proceedings does not seem to be even questionable. *Grin v. Shline*, 187 U.S. 181, 23 Sup. Ct. 98, 47 L. Ed. 130; *Ex parte La Mantia* (D.C.) 206 Fed. 330. We do not understand that it is claimed that those documents, which included depositions tending to prove the alleged murder of Joseph Lipshic by the appellants, and a finding by the Supreme Court of Chile of the existence of the crime and that the depositions indicate the guilt of appellants, did not, if they were admissible, constitute sufficient evidence to sustain the order made. Those documents included a showing to the effect that under the Chilean law depositions taken in the investigation of a criminal transaction, when the flight of the accused from Chile is disclosed, are referred to the tribunal mentioned for its determination as to the sufficiency of the evidence of the guilt of the fugitive to warrant the making of a request for his extradition.

Voloshin et al. v. Ridénour, U S Marshal, 299 Fed. 134, 139 (C.C.A. 5th, 1924).

The attorney representing the Italian Government in proceedings for the extradition to Italy of Francesco Cimino inquired of the Department of State whether there was "anything in the Regulations or practice of the Diplomatic Service that would support the contention that the Second Secretary [of the American Embassy at Rome] had the power to act for the Ambassador" in the matter of the authentication of extradition documents prepared for use in connection with an extradition application of the Italian Government. The Under Secretary of State informed the attorney that—

Mr. Harold H. Tittman, who signed the certificate on October 1, 1925, was not the principal diplomatic officer at the American Embassy in Rome on the date mentioned.

The Department understands that under the rulings of the courts of the United States resort may be had to oral testimony to render such documents admissible in evidence, such testimony being to the effect that the documents would be received by the tribunals of Italy as evidence of criminality of the fugitive if he were under examination there on the charge for which his extradition is sought.

Peter Trenchi to the Department of State, Mar. 2, 1926, MS. Department of State, file 211 65C49/1; Under Secretary Grew to Mr. Trenchi, Mar. 18, 1926, *ibid.* /3.

The sufficiency of the evidence of criminality is not open to question, if certain affidavits received in evidence at the hearing were properly authenticated. George A. Bucklin, "consul of the United States of America, American Consulate, Victoria, B.C., Canada," certified that the affidavits and documents in question were properly and legally authenticated, so as to entitle them to be received in evidence for similar purposes by the tribunals of Canada, as required by the Act of Congress of August 3, 1882. . . .

Several objections are urged against the sufficiency of this certificate. It is first contended that the American consul at Victoria is not the principal diplomatic or consular officer of the United States resident in the Dominion of Canada. Section 1674 of the Revised Statutes (Comp. St. §3116) provides that consul general, consul, and commercial agent shall be deemed to denote full, principal, and permanent consular officers, as distinguished from subordinates and substitutes. On the argument before this court counsel conceded that in one sense there is no principal diplomatic or consular officer of the United States resident in Canada, inasmuch as all such officers are equal in authority, though not in rank. From this it is argued by the appellee that there is no consular officer of the United States resident in Canada who is authorized to make the certificate in question. The appellant, on the other hand, contends that any American consul resident in that country is a principal within the meaning of the statute.

We are inclined to agree with this latter view. We understand that it has been the practice for years for such consular officers to make these certificates, and the practice has been recognized by the Department of State by furnishing blanks for that purpose.

Desmond, Sheriff, et al. v. Eggers, 18 F. (2d) 503, 504, 505 (C.C.A. 9th, 1927).

The Department of State informed the Consul General at Ottawa that the term "principal consular officer", as used in the statutory provision relating to the certificate by a principal diplomatic or consular officer of the United States as to the authentication of documents to be used in extradition cases, means the principal consular officer of a particular district. The Chief of the Consular Office (Hengstler) to Consul General Foster, Mar. 7, 1924, MS. Department of State, file 211.42/65

In 1906 the Department of State received the following despatch from the Consul at Windsor, Canada:

"Provincial detective C. A. Mahoney of Windsor has requested that I authenticate the papers that will be used in the extradition proceedings against James Kinster charged with larceny at Essex County, Ontario, in this consular district

"It would seem by the United States statutes as quoted in paragraph 425 of Consular Regulations that only 'the principal consular officer' of the Dominion of Canada is qualified to make this authentication and yet Form No. 36, seems to have been prepared for the use of Consuls.

"I have also understood that the attorneys for the defendant in this case, will raise the point that I not being a principal consular officer, have no right to authenticate the papers, though a case is reported of an alleged criminal being extradited from the United States on papers authenticated by an American Vice-Consul in Canada.

"If I, the American Consul in the district in which the crime is alleged to have been committed, am not authorized to authenticate these extradition papers, please instruct me as to who is the principal consular officer of The Dominion of Canada to whom the Canadian authorities should apply for proper authentication."

The Department replied:

"... In considering this section [sec. 5271, Rev. Stat.] the Attorney General said, 'I think that the certificate should show upon its face that the officer who makes it, is the principal diplomatic or consular officer of the United States resident in the country making the demand for extradition'. (10 Op. Att. Gen. 506.)

"In the case considered by the Attorney General the certificate had been made by the United States Consul at Leipsic (Saxony) and the Attorney General appeared to regard such Consul as the proper one to make the authentication or at least urged no objection to this authentication. At this time (1863) there were two Consuls in Saxony (at Leipsic and Dresden) and no Consul General.

"It is believed, therefore, that for the purposes of certifying extradition papers under the provisions of Section 5271 R.S., the following rules should be observed:

"1. That a Consul General is, for the purposes of this statute, the principal consular officer within his district. He should, therefore, certify all extradition papers presented for certification within his district.

"2. That where there is no consul general, each consul is, for the purposes of the statute, the chief consular officer within his district, and the consul should, therefore, certify the extradition papers presented for certification."

Consul Conant to the Assistant Secretary of State, June 2, 1909, and the Chief Clerk (Carr) to Mr. Conant, June 16, 1909, MS. Department of State, file 19931.

It is not necessary to attach to documents which have been authenticated by American consular officers in foreign countries a further certificate showing that the person authenticating the documents is in fact a consul in order that the documents may be used in extradition proceedings instituted in the United States.

Record of Proceedings, p. 2, MS. Department of State, file 211.42M142/1.

The Consul General at Halifax enclosed with a despatch to the Secretary of State "a copy of a certificate reluctantly given by me [him] on the 5th instant as to the proper and legal authentication of certain depositions proposed to be used upon an application for the EXTRADITION OF ONE, RAY CASS". The Consul General stated that he certified that the depositions were "properly and legally authenticated, so as to entitle such depositions to be used for similar purposes and [*sic*] tribunals of the said Province and of the Dominion of Canada". He added:

My reluctance in giving the certificate was due primarily to the fact that, not being a lawyer by education, and especially not a Canadian lawyer, I am really not in a position to know whether, or not, the depositions in question were properly and legally authenticated for the purposes specified, and it seems to me that an American consular officer should, not only not

be compelled, as he seems to be by the Consular Regulations of 1896, to give such a certificate, but that he should not be permitted to do so, even though the Act of August 3, 1882, provides that he do so, although the concluding paragraph of Paragraph 425 of the Consular Regulations enjoins exercise of the greatest care in making the authentication provided for in the Act.

The Department of State informed the Consul General:

The Act of August 3, 1882, and previous Acts of a similar character were passed to avoid the necessity of producing witnesses in person before magistrates in the United States in support of applications for the extradition of persons to foreign countries. In the absence of such legislation, the difficulties in the way of extradition from the United States would be so great as to defeat largely the purposes of the extradition treaties.

The diplomatic and consular officers of the United States appear to experience no difficulty, generally speaking, in making the certificates contemplated by the Act of August 3, 1882, and the Department is of the opinion that inasmuch as you were advised by the Attorney General for Nova Scotia that the documents which were submitted for your certification would be received for the purposes indicated in any Province of Canada, you were justified in making the desired certificate.

Consul General Robertson to Secretary Hughes, Feb. 7, 1924, and the Chief of the Consular Bureau (Hengstler) to Mr. Robertson, Feb. 20, 1924, MS. Department of State, file 211.42C27/1. To the same effect, see the Acting Secretary of State (Wilson) to the Chargé d'Affaires in Russia (Schuyler), Oct. 25, 1909, *ibid.* 21794/-3.

Extradition to U.S.

Other countries do not generally require that there be attached to documentary evidence in support of requests for extradition to the United States a certificate comparable to that required to be attached by the principal American diplomatic or consular officer to documents in support of requests for extradition from the United States. However, it is necessary in all cases that each warrant, affidavit, deposition, or other paper included as documentary evidence be certified by a notary public or other officer authorized to make such a certification and that the certification be authenticated under the great seal of the particular State or under the seal of the Department of Justice, as the case may be, in order that the authentication by the Secretary of State may be attached.

The Governor of Alabama requested on May 15, 1907 the provisional arrest and detention with a view to the extradition from Mexico of Robert L. Dix, indicted for murder in the first degree. When the Department of State inquired whether a warrant for the arrest of the fugitive had been issued in Alabama, the Governor replied that such warrant had been issued and that the fugitive was

under sentence of death. Thereupon the Acting Secretary of State informed the Governor:

The second paragraph of Article 8 of the treaty of extradition in force between the United States and Mexico provides that, "if a person whose extradition is asked for shall have been convicted of a crime or offense, a copy of the sentence of the court in which he was convicted, authenticated under its seal, with attestation of the official character of the charge by the proper executive authority, and of the latter by the minister or consul of the respective contracting party shall accompany the requisition."

The general certificate of the Governor under the seal of the State of Alabama states that the "indictment" which is enclosed is authentic, in accordance with the laws of Alabama, but it does not purport to authenticate the balance of the papers. The treaty requires that there must be an "attestation of the official character of the charge by the proper executive authority". The papers are therefore returned, in order that there may be a strict compliance with this provision, and that thereby any possible question that might arise as to the sufficiency of the papers as now submitted may be obviated.

Governor Comer to Secretary Root, telegram of May 15, 1907, and Acting Secretary Bacon to Mr. Comer, telegram of May 16, 1907, MS. Department of State, file 6528; Mr. Comer to Mr. Bacon, telegram of May 16, 1907, *ibid.* 6528/1; Mr. Comer to Mr. Root, May 17, 1907, and Mr. Bacon to Mr. Comer, May 22, 1907, *ibid.* /2-3.

The extradition of Cornell Rees, requested by the United States, was denied by the district judge of the State of Nuevo León, Mexico, on the ground of insufficient legalization of the documents submitted by the United States in support of its request for the extradition. The record of the case was submitted to the Legal Counselor of the Mexican Foreign Office, who, while pointing out the difference in the procedures followed by the two Governments regarding the legalization of extradition papers, held that the papers in this case were properly legalized. In order to avoid similar difficulties in the future, the Minister of Foreign Affairs requested the American Ambassador to suggest to the Government of the United States the convenience of having the copies of documents used in support of requests for extradition legalized by the Mexican Embassy in Washington or by a consular officer of Mexico. The Acting Secretary of State replied:

The Department will take pleasure in conforming to the wishes of the Mexican Government, as expressed in your despatch, with respect to the authentication of extradition papers by the Mexican Embassy at this capital.

Ambassador Thompson to Secretary Root, June 24, 1908, and Acting Secretary Bacon to Mr. Thompson, July 17, 1908, MS. Department of State, file 11146/14.

Delegation
of authority

In acknowledging the receipt of a letter from the Governor of Texas, transmitting papers relating to the extradition from Mexico of Juan de Dios Rodriguez, charged with murder in Texas, the Acting Secretary of State said that—

several of the depositions furnished were sworn to before the clerk of the court acting by deputy. It is understood by the Department that in the absence of a special statute allowing this, notarial authority cannot be delegated. It would therefore seem that unless the laws of Texas expressly provide for such delegation of authority, these depositions are not properly sworn to.

The Governor replied :

Certificates showing authority of the county clerk to appoint deputy who has authenticated some of the accompanying papers are also attached.

Acting Secretary Wilson to Governor Campbell, Mar. 16, 1909, MS. Department of State, file 16948/9-16; Mr. Campbell to Secretary Knox, Mar. 26, 1909, *ibid.* /17-18.

Oral
testimony

The admission of oral testimony in connection with extradition proceedings was held not to be reversible error, notwithstanding that the treaty under which the proceedings were had provided that the asylum government should hold the fugitives and that the demanding government should undertake to forward the evidence in the form of depositions.

Voloshin et al. v. Ridenour, U. S. Marshal, 299 Fed. 134, 141 (C.C.A. 5th, 1924).

EVIDENCE IN DEFENSE

§330

Section 3 of the act of Congress approved August 3, 1882 (22 Stat. 215; 18 U.S.C. §656) provides :

Statutory
provision

On the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he can not safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed. . . .

The Supreme Court in considering this provision stated :

The contention is that the effect of this provision is to give the accused the right to introduce any evidence which would be admissible upon a trial under an issue of not guilty. To this we

cannot agree. The prime purpose of the section is to afford the defendant the means for obtaining the testimony of witnesses and to provide for their fees. In no sense does the statute make relevant, legal or competent evidence which would not have been competent before the statute upon such a hearing. True, the statute speaks of evidence "material for his defense, without which he cannot safely go to trial," but we cannot discover that Congress intended to depart from the provisions of Article I of the treaty which requires that a surrender shall be made "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment, if the crime had been there committed."

There is not and cannot well be any uniform rule determining how far an examining magistrate should hear the witnesses produced by an accused person. The proceeding is not a trial. The issue is confined to the single question of whether the evidence for the State makes a *prima facie* case of guilt sufficient to make it proper to hold the party for trial. Such committing trials, if they may be called trials in any legal sense, are usually regulated by local statutes. Neither can the courts be expected to bring about uniformity of practice as to the right of such an accused person to have his witnesses examined, since if they are heard, that is the end of the matter, as the ruling cannot be reversed.

. . . To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the Government.

Charlton v. Kelly, Sheriff of Hudson County, New Jersey, 229 U.S. 447, 458-461 (1913).

It must be conceded at the outstart that no right is given to one accused of crime under the laws of the state of Washington to offer testimony in his own behalf before a committing magistrate. The most that can be claimed is that he is entitled to offer himself as a witness in his own behalf, if he so desires. *Rem. Comp. Stat. of Washington 1922, §2148.*

Desmond, Sheriff, et al. v. Eggers, 18 F. (2d) 503, 505 (C.C.A. 9th, 1927).

. . . no procedural rule of a State could give to the prisoner a right to introduce evidence made irrelevant by a treaty.

Collins v. Loisel, United States Marshal for the Eastern District of Louisiana, 259 U.S. 309, 317 (1922).

. . . I think it is clear that the testimony of Mertz and Vaccaro, who were present at the time the offense is said to have been committed, should have been, as it was, received, to explain the statements of the witnesses in the depositions of the Canadian government, on the issues of where Bilodean was killed, whether the killing was an accident, or otherwise justified, as claimed by Mertz, or murder as claimed by the Canadian government.

If, as indicated in the opinions quoted, the provisions of the law of Texas are to be looked to, this position is still further sustained. Under the Texas law, Mertz had the unquestioned right to testify in his own behalf. And under the Texas procedure, in examining trials before magistrates, the defendant offers, and the magistrate considers, the testimony of the defendant's witnesses.

Extradition of Mertz, 52 F. (2d) 241, 243 (D.C., S.D. Tex., 1931).

Alibi. Manifestly testimony tending to show that the appellee was not in British Columbia on that date would necessarily tend to contradict the testimony of these witnesses. And in our opinion, whatever the rule may be in other cases, a foreign government should not be required to produce testimony before a committing magistrate in this country to rebut testimony tending to show that the accused was in the city of Seattle or elsewhere at the time of the commission of the crime.

Desmond, Sheriff, et al. v. Eggers, 18 F. (2d) 503, 506 (C.C.A. 9th, 1927).

The Ambassador of Mexico requested on December 26, 1907 the extradition of Luciano and Benito Matus, who were charged in Mexico with murder. Following a hearing before the United States commissioner for the Second Judicial District of the Territory of Arizona, the attorney for the accused wrote to the Secretary of State saying that, in his opinion, the commissioner erred in holding the prisoners for extradition. He added:

I wish further to say that in addition to the evidence produced before the Commissioner on the hearing of the said matter, I have since that time secured the statement of two other American witnesses, citizens of the United States, one of whom at least will swear that within a few hours after the murder was committed, these two Yaquis were at their home in Nogales, Arizona, at such a distance from the scene of the murder as to render it impossible for them to have participated in the crime.

The Acting Secretary of State replied:

Under the decisions of the Courts of the United States if evidence is presented before the examining magistrate showing the commission of the crime and that there is reasonable ground to believe the fugitive guilty thereof, the magistrate is constrained to commit the accused for surrender. The Department is of opinion, in the present case, after an examination of all the papers, that the evidence justifies the action of the commissioner in committing the prisoners for surrender, and has accordingly issued its warrant for their surrender and sent the same to the Mexican Embassy.

It would seem that the evidence to which you refer in the final paragraph of your letter might properly be presented to the court at the time of the trial of the accused. However, as this evidence is merely cumulative, the Department does not feel that it affords

sufficient cause for withholding the issuance of the warrant of surrender.

The Mexican Ambassador (Creel) to the Secretary of State (Root), Dec. 26, 1907, MS. Department of State, file 10721; Frank J. Duffy to Mr. Root, Apr. 11, 1908, and Acting Secretary Bacon to Mr. Duffy, Apr. 24, 1908, *ibid.* 10721/9-10.

The United States commissioner at Omaha, Nebraska, admitted, at the hearing in the proceedings had before him in the matter of the application for the extradition to Canada of Hart Henshaw and others, evidence designed to establish an alibi for the accused [Henshaw]. The commissioner stated that he did not believe he had any right to consider evidence which merely contradicted evidence introduced on behalf of the demanding government; that he admitted much testimony with the reservation that he would exclude such part of it as he thought should be excluded and consider what he thought should be considered; and that such evidence as he considered explanatory of the evidence on behalf of the Canadian Government would be properly considered and that which was contradictory would not be considered. All the evidence offered was transcribed and included in the record of proceedings, which was transmitted to the Department of State. Joseph R. Baker of the Office of the Solicitor for the Department of State, in commenting on the question of the Department's right to consider the evidence which was contained in the record but which was not considered by the commissioner, said:

The situation in the present case is somewhat peculiar in that while the Commissioner refused to consider the evidence of the defense, such evidence was transcribed before him and is included in the Records transmitted to the Department. Therefore, regardless of the decision of the Commissioner, the Department, which, in effect, is an appellate court, is in a position, if it sees fit, to give consideration to such evidence in arriving at its conclusion as to whether the defendant shall be surrendered or discharged.

The prisoners also have their right of recourse to the courts from the Commissioner's decision, and presumably in such proceedings, any errors of law which were committed by the Commissioner will be corrected. However, as seen before, the United States District Judge at Omaha has dismissed the habeas corpus proceedings instituted by the prisoners in this case, and the Department is not informed as to whether an appeal has been taken from his decision.

It is submitted that since the Department is in possession of all the testimony offered by the accused, and is in a position to render a decision in the matter, wholly independent of the decision handed down by the Commissioner, the Department may, if

it sees fit, disregard the apparent error of the Commissioner and render its decision upon all the testimony offered in the case.

The Department would be warranted, notwithstanding the apparent error of the Commissioner in excluding the defendant's testimony, in passing upon the whole case without regard to the Commissioner's decision, since it has before it all of the evidence offered by the accused.

Memorandum of the Office of the Solicitor for the Department of State,
June 22, 1921, MS. Department of State, file 211 42W671/5

Mistaken
identity

Following the receipt of a request made in 1906 by the Governor of New Jersey for the provisional arrest and detention, with a view to his extradition from Cuba, of Kingdon Milton Saul and the issuance of instructions by the Department of State to the Legation at Habana, the American Minister telegraphed: "Saul, alias Fitzgerald, arrested today. Has confessed identity." Although the Governor of New Jersey had furnished a description of the accused, it apparently was not transmitted to the Legation. Later the Governor informed the Department:

We have just received the following telegram from W. H. Speer, Prosecutor of Pleas of Hudson Co. N.J. "Telegraph State Department, Washington to order release of Thos. Fitzgerald, under arrest at Havana, Cuba, supposed to be Kingdon Milton Saul".

Will you please take the necessary action.

In an instruction to the Minister the Department said:

The information that the fugitive had admitted his identity is based upon your telegram of November 12, 1906, which reads as follows: "Saul, alias Fitzgerald, arrested to-day. Has confessed identity."

In view of the fact that it now appears that the wrong man was arrested, the Department would be glad to receive from you a detailed report upon the facts of this case, and especially upon the circumstances under which the arrest was made as reported in your telegram.

After the receipt of the Minister's report the Department instructed him:

In reply I have to say that so far as the Department is concerned this case seems to have ended. It may be well, however, to make some observations regarding it which may be useful in the future should similar cases arise.

Since you did not furnish copies of Mr. Fitzgerald's protests with your despatch, the Department cannot judge of the exigency of their contents. It would appear that the proper action to adopt would have been immediately to advise the Department that it

was charged that a mistake had been made concerning the identity of the prisoner with the person wanted in New Jersey and request that the matter be investigated. By failing to do so the only channel through which the prisoner could apply for aid was effectually closed.

In future cases where the identity of the fugitive may be in doubt, as it was in this instance, it would be well for you to make a personal investigation and give to the prisoner's representations careful and prompt attention in order that due justice may be done him.

In cases of extradition the prisoner is not entitled to bail, but is held in prison pending the further action of the demanding government. If a mistake is made in arresting the wrong man, the only way to rectify it is for the demanding government to withdraw its request for the arrest: otherwise the prisoner is likely to be unjustly detained during the entire period of detention stipulated in the treaty before he can secure his release from the authorities. As the demanding government is the only party who can order the prisoner's release, it becomes very necessary that neither it nor any of its representatives should overlook any complaint that a mistake has been made, such as was made in this instance, which it alone can remedy.

Governor Stokes to the Department of State, and the Acting Secretary of State (Adee) to the Legation at Habana, Nov. 10, 1906, MS. Department of State, file 2191; the Minister to Cuba (Morgan) to the Secretary of State (Root), Nov. 12, 1906, *ibid.* 2191/1; Mr. Stokes to Mr. Root, Jan. 16, 1907, *ibid.* /20; the Acting Secretary of State (Bacon) to Mr. Morgan, no. 110, Jan. 26, 1907, *ibid.* /25; Mr. Bacon to Mr. Morgan, no. 116, Feb. 18, 1907, *ibid.* /26.

The petitioner questions the sufficiency of the evidence as to identity. Again, this is a question of fact, and should be clearly and definitely determined. Similarity of name, handwriting, and photograph, coupled with direct identification thereof, and with uncontradicted statements as to the whereabouts of the accused and his history, which in general coincide with what is known of the defendant petitioner, furnish sufficiently strict proof, if found credible by the commissioner. The record fails, furthermore, to show any actual contradiction or plea that the defendant is not the person wanted.

In re Lincoln, 228 Fed. 70, 72 (D.C., E D N.Y., 1915).

When an alleged fugitive who is arrested with a view to his extradition to a foreign country denies that he is the party wanted, proof of identity must be furnished by the demanding government.

The Assistant Attorney General (Luhning) to the Secretary of State (Kellogg), Nov. 16, 1926, MS. Department of State, file 211.12L97/4.

In replying to D. S. Barker, who had written to the Secretary of State on behalf of Severiano Riojas, urging that Riojas, on account

Evidence of
citizenship

of his American citizenship, should not be extradited to Mexico, the Legal Adviser stated :

If the Department shall receive the record of proceedings had before an extradition magistrate in this case, it will give careful consideration to the matter in the light of the evidence disclosed and the pertinent treaty provisions with Mexico.

If in fact Mr. Riojas is an American citizen, he should apparently submit evidence of that fact to the extradition magistrate.

The Legal Adviser of the Department of State (Hackworth) to D S. Barker, Sept. 17, 1937, MS. Department of State, file 211.12 Riojas, Severiano/10.

James J. Sullivan of Lawrence, Massachusetts, telegraphed on Dec 12, 1909 to the Secretary of State as follows :

"Wish resist extradition Copel Webber Canada. Please notify my expense."

The Secretary of State replied on Dec. 13, 1909, stating in part as follows :

"Your representations re Webber's extradition should be made to Committing Magistrate."

James J. Sullivan to Secretary Knox, telegram of Dec. 12, 1909, and Mr. Knox to Mr. Sullivan, telegram of Dec. 13, 1909, MS Department of State, file 22692.

WEIGHT AND EFFECT OF EVIDENCE

§331

Prima-facie case

The weight and effect to be given to the evidence submitted in extradition proceedings is variously defined, although it commonly is provided by treaty that evidence should be such as would justify the commitment of the accused for trial in the asylum state if the crime or offense had been there committed. Usually it is held that the evidence must be such as to establish a *prima-facie* case against the accused or that there is probable cause to believe the accused to be guilty of the offense or offenses charged.

Article X of the treaty of August 9, 1842 between the United States and Great Britain (1 Treaties, etc. [Malloy, 1910] 650, 655; 8 Stat. 572, 576) provides that extradition shall be had only on such evidence of criminality as, according to the laws of the place where the person charged is found, would justify his arrest and commitment for trial if the offense had been there committed. In connection with the application by the Government of Great Britain for the extradition to India of Charles Glen Collins, the Supreme Court stated :

Finally Collins contends that the evidence of criminality was not such as under the law of Louisiana would have justified his apprehension and commitment for trial if the crime or offense had been committed there. The argument is that by the law of Louisiana a person charged with having committed an offense

is entitled to make a voluntary declaration before the committing magistrate and also to present evidence in his own behalf (Revised Statutes 1870, §1010; Laws of 1886, Act No. 45); that this right to introduce such evidence is, therefore, secured to a prisoner by the treaty; and that this requirement as to evidence of criminality was not complied with, because Collins was not permitted to introduce evidence in his own behalf.

Collins was allowed to testify, and it was clearly the purpose of the committing magistrate to permit him to testify fully, to things which might have explained ambiguities or doubtful elements in the *prima facie* case made against him. In other words, he was permitted to introduce evidence bearing upon the issue of probable cause. The evidence excluded related strictly to the defense. It is clear that the mere wrongful exclusion of specific pieces of evidence, however important, does not render the detention illegal. *Charlton v. Kelly*, 229 U.S. 447, 461. The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction. *Grin v. Shine*, 187 U.S. 181, 197; *Benson v. McMahon*, 127 U.S. 457, 461; *Ex parte Glaser*, 176 Fed. 702, 704. In *In re Wadge*, 15 Fed. 864, 866, cited with approval in *Charlton v. Kelly*, *supra*, 461, the right to introduce evidence in defense was claimed; but Judge Brown said: "If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties." The distinction between evidence properly admitted in behalf of the defendant and that improperly admitted is drawn in *Charlton v. Kelly*, *supra*, between evidence rebutting probable cause and evidence in defense. The court there said, "To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the Government." And in that case evidence of insanity was declared inadmissible as going to defense and not to probable cause. Whether evidence offered on an issue before the committing magistrate is relevant is a matter which the law leaves to his determination, unless his action is so clearly unjustified as to amount to a denial of the hearing prescribed by law.

The phrase "such evidence of criminality" as used in the treaty refers to the scope of the evidence or its sufficiency to block out those elements essential to a conviction. It does not refer to the character of specific instruments of evidence or to the rules governing admissibility. Thus, unsworn statements of absent witnesses may be acted upon by the committing magistrate, although they could not have been received by him under the law of the State on a preliminary examination. *Elias v. Ramirez*, 215 U.S. 398; *Rice v. Ames*, 180 U.S. 371. And whether there is a variance between the evidence and the complaint is to be decided by the general law and not by that of the State. *Glucksman v. Henkel*, 221 U.S. 508, 513. Here the evidence introduced was clearly sufficient to block out those elements essential to a conviction under the laws of Louisiana of the crime of obtaining property by false pretenses. The law of Louisiana could not, and does not attempt to require more. It is true that the procedure to be followed in hearings on commitment is determined by the law of the State in which they are held. *In re Farez*, 7 Blatchf. 345, Fed. Cas. No. 4645; *In re Wadge*, *supra*; *In re Kelley*, 25 Fed. 268; *In re Ezeta*, 62 Fed. 972, 981. But no procedural rule of a State could give to the prisoner a right to introduce evidence made irrelevant by a treaty.

Collins v. Loisel, United States Marshal for the Eastern District of Louisiana, 250 U.S. 309, 815 (1922).

Michael Schorer sought by a petition for a writ of *habeas corpus* to defeat the request of the German Government for his extradition, on the ground that there was no competent evidence in the record upon which the commissioner before whom a hearing was had could exercise his judgment. The District Court of the United States for the Eastern District of Wisconsin, in rejecting this contention, stated:

It must be borne in mind that the accused was not on trial before the commissioner for the crimes charged. The only question to be determined by the commissioner was that of probable cause; or, to use the language common in treaties, whether there was such evidence of criminality as will justify the apprehension and commitment; and it must likewise be borne in mind that upon *habeas corpus* the question is narrowed down to determining whether there is any legal evidence upon which the extradition commissioner could exercise his judgment or discretion. *In re Bryant*, 167 U.S. 104, 17 Sup. Ct. 744, 42 L. Ed. 94.

Ex parte Schorer, 197 Fed. 67, 76 (1912).

In the hearings accorded by extradition magistrates in the United States to fugitives from the justice of foreign countries it is sufficient for the demanding government to present such evidence as would justify a committing magistrate in holding the accused by imprisonment or under bail to await subsequent proceedings.

Ex parte Glaser, 176 Fed. 702, 704 (C.C.A. 2d, 1910).

It is not necessary in extradition proceedings that the evidence against the respondent be such as to convince the committing judge or magistrate of his guilt beyond a reasonable doubt, but only such as to afford reasonable ground to believe that the accused is guilty of the offense charged. *Fernandez v. Phillips*, 268 U.S. 311, 45 S. Ct. 541, 69 L. Ed. 970.

United States ex rel. Lo Pizzo v. Mathues, U. S. Marshal, 36 F. (2d) 565, 568 (C.C.A. 3d, 1929).

All that is necessary for extradition is evidence establishing reasonable ground for the belief that the accused has committed a crime, for which extradition is sought, which is an offense within the treaty. Competent evidence to establish reasonable grounds to sustain extradition is not necessarily evidence competent to convict. *Fernandez v. Phillips*, 268 U.S. 311, 45 S. Ct. 541, 69 L. Ed. 970; *Ex parte Glucksman* (C.C.) 189 F. 1016; *U.S. v. Piazza* (D.C.) 133 F. 998.

In re Dubroca y Paniagua, 33 F. (2d) 181, 182 (D.C., E.D. Pa., 1929).

It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while of course a man is not to be sent from the country merely upon demand and surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender.

Glucksman v. Henkel, *United States Marshal*, 221 U.S. 508, 512 (1911).

Ignatius T. T. Lincoln was held to await the action of the Secretary of State upon a requisition for extradition to England. In petitioning for a writ of *habeas corpus*, the accused urged, among other grounds for his release, that the documentary evidence introduced by the British Government was insufficient to warrant his commitment. The court said:

Section 5270, R.S. (Comp. St. 1913, §10110), provides that the person charged shall be committed to jail, if held, "there to remain until such surrender shall be made." Under section 5273, R.S. (Comp. St. 1913, §10119), he may be released, however, upon application to a judge, unless delivered up and conveyed out of the United States within two calendar months after such commitment.

The order of the court, under section 5270, is to be made if the evidence is deemed "sufficient to sustain the charges under the provisions of the proper treaty". The charges before the court are the accusations of crime. The action of the Secretary of State is "according to the stipulations of the treaty."

This gives full effect to article 10 of the Treaty of August 9, 1842, providing that only upon sufficient competent evidence to make out a *prima facie* case of crime charged in the place

where the hearing is held shall the defendant be held for extradition. The certificates attached show the papers certified to be sufficient to make out the crime as known in the foreign jurisdiction, and the conclusions of the magistrate, where the hearing is held, must also be based upon evidence sufficient to make out the crime as known in *that* jurisdiction. The rights of the alleged criminal will thus certainly be protected, even though the definition of the crime itself or the necessary requisites to make up the charge may differ slightly between the two places.

As to this objection, therefore, the question must be disposed of in precisely the same manner as those previously considered, and the conclusions of the judge sitting as commissioner upheld, for the evidence presented, as found by the judge upon the hearing, makes out a *prima facie* case of the crimes as known in this jurisdiction and also in the county of London, England.

In re Lincoln, 228 Fed. 70, 73 (D.C., E.D.N.Y., 1915).

Relevancy The question whether evidence offered on any issue before a committing magistrate is relevant is a matter which the law leaves to the determination of such magistrate unless his action is so clearly unjustified as to amount to a denial of the hearing prescribed by law.

Collins v. Loisel, *United States Marshal for the Eastern District of Louisiana*, 259 U.S. 309, 317 (1922).

Sufficiency In connection with proceedings instituted with a view to the extradition of Samuel Thompson to the Bahama Islands on a charge of embezzlement, the Ambassador of Great Britain sent certain papers to the Secretary of State and requested to be informed whether these papers would afford sufficient evidence for the issuance of a warrant of extradition. The Acting Secretary of State informed the Ambassador that—

the question of the sufficiency of the evidence offered in support of a request for the extradition of a criminal is, in the first instance, one for the extradition magistrate before whom the proceedings are instituted. If he deems the evidence sufficient to sustain the charge, he forwards a transcript of the evidence and of the proceedings had before him to the Secretary of State for his action. If the evidence is not deemed sufficient by the magistrate, the prisoner is discharged and the case does not come before this Department.

Ambassador Bryce to Secretary Knox, Oct. 10, 1911, and Acting Secretary Adee to Mr. Bryce, Oct. 13, 1911, MS. Department of State, file 211.41T37/2.

Antonio di Stefano, whose extradition was requested by the Government of Italy and who sought release by a writ of *habeas corpus*, attacked the legality of his detention on the ground that the crime with which he was charged was not extraditable. The court held:

The sufficiency of the evidence of criminality in the case at bar is to be determined by the law of the state of New York.

On the evidence as offered in these proceedings, it appears that there was present every element necessary to sustain the charge of murder in the first degree, as defined by the laws of the state of New York, if death had resulted, and, inasmuch as death did not result, an attempt to commit murder could be charged.

Relator's contention is that, on the evidence received, the only charge that could be laid under the laws of the state of New York is that of assault in the first degree, . . .

Relator contends that, as assault in the first degree is not enumerated in the extraditable crimes in the treaty between the United States and Italy, the relator may not be extradited for the crime of an attempt to commit murder.

I am convinced that, even under the laws of the state of New York, the evidence received would be sufficient on which to charge an attempt to commit murder; but even if that were not so, the act charged is an attempt to take the life of the accuser, and that is a crime both in New York and Italy, whether it be called assault in the first degree, or, as defined in the treaty, attempted murder, and the offense is extraditable.

United States ex rel. di Stefano v. Moore, United States Marshal, et al., 46 F. (2d) 308, 309 (D.C., E.D.N.Y., 1930); affirmed 46 F. (2d) 310 (C.C.A. 2d, 1930).

I do not understand that either the treaty or the statutes require me to blindly accept, and without question, testimony produced by a deposition of this character; but that I am to determine the credibility of the witnesses, and the weight to be given their testimony, as in other cases. If the rule be otherwise, why a judicial hearing?

Extradition of Mertz, 32 F. (2d) 241, 245 (D.C., S.D. Tex., 1931).

Pursuant to plans agreed upon by the authorities of the United States and of Canada, Sarro Vaccaro, an informer employed by the Narcotics Bureau of the Treasury Department, and Fred H. Mertz, a narcotics agent of the United States, were sent to Canada to investigate alleged smuggling operations of certain suspected persons. Contacts were made with the suspected persons, and arrangements were completed whereby they were to deliver a quantity of narcotics at West Stewartstown, New Hampshire, a few miles south of the international boundary. After the transaction was completed the smuggler who delivered the narcotics was arrested and taken by Vaccaro and Mertz to the border to aid them in effecting the arrest of another of the smugglers. The smuggler who had returned to the border with Vaccaro and Mertz was shot while attempting to escape and shortly thereafter died. The other smuggler was ar-

*Locus of
crime*

rested and taken to Colbrook, New Hampshire, where he was placed in jail. There was some evidence that these occurrences, which took place on May 29, 1925, were on Canadian territory.

On January 28, 1930 the Minister of Canada formally requested the extradition of Vaccaro on charges of murder, larceny, and kidnapping. The accused was held by the United States commissioner at Baltimore. The District Court of the United States for the District of Maryland dismissed the three charges and granted a writ of *habeas corpus*. An appeal was taken by the United States marshal, on behalf of the Government of Canada, to the United States Circuit Court of Appeals for the Fourth Circuit, which sustained the District Court on the charges of murder and larceny but reversed it on the charge of kidnapping. The Secretary of State declined to extradite Vaccaro, stating in a note addressed to the Minister of Canada on July 18, 1934:

Careful consideration has been given to all phases of this somewhat complicated case and I deem it advisable to lay before you certain pertinent features thereof.

Vaccaro's journey to Canada was undertaken by order of his superiors in office and after personal consultations by them with the Canadian officials charged with the enforcement of the laws of Canada against the traffic in narcotics who were in entire agreement with officials of the United States as to the purpose of that visit, which was to bring about the arrest in the United States of persons engaged in that traffic, including Robert A. Price, the individual Vaccaro is charged with kidnapping, whose activities in the traffic were notorious on both sides of the border and who, indeed, following the alleged kidnapping, was convicted of and served a sentence for a violation of the laws of Canada against that traffic. Moreover, at the time when Vaccaro restrained Price, the latter was quite apparently engaged in the commission of a crime.

The action taken by Vaccaro against Price near the border was animated by the keen desire of the former for the success of the plan, approved by the appropriate Canadian authorities, to arrest Price in the United States for a violation of its laws and was largely influenced by existing circumstances which strongly menaced such success.

Previous proceedings had in the matter might well have caused Vaccaro to believe that he was justified in what he did, even assuming that he knew he was on Canadian soil when he did it. At any rate, the Honorable F. W. Cowan, the Head of the Canadian Narcotic Division, appears to have held the view that Vaccaro's action was justified for on June 4, 1925, following the occurrences in question and with regard thereto, he wrote the Narcotic Agent in Charge at Boston, Massachusetts, as follows:

"I am glad indeed to learn that you succeeded in landing this trio of narcotic smugglers, and am only sorry that anything should have occurred to mar the success of your venture. These smugglers, however, must be prepared to take their chances when they

persist in violating the Customs and Narcotic Laws of the country. I sincerely hope that your Officer Mertz may be entirely exonerated on the charge of manslaughter, which we understand has been preferred against him."

In view of the foregoing, I believe that I am justified in resolving the doubt arising from conflicting evidence on the question of the *locus* of the acts performed by Vaccaro, in favor of the accused, and I deem it pertinent in this relation to point out that, whereas the alleged offense dates back to the year 1925, it was not until four years later that your Government collected the affidavits which it offered in evidence before the Extradition Commissioner in support of the application for Vaccaro's surrender. This lapse of time may perhaps have affected the memory of affiants with respect to the events concerning which they testified, particularly in view of the fact that Vaccaro's actions in apprehending Price were performed so near the border between the two countries.

In all of the circumstances of the case, I feel that I must decline to issue a warrant for Vaccaro's surrender to the authorities of your Government.

The Secretary of State (Hull) to the Canadian Minister (Herridge), July 18, 1934, MS. Department of State, file 211.42 Vaccaro, Sarro/62

REARREST

§332

Charles Glen Collins, whose extradition to India was requested by the Government of Great Britain, was discharged and immediately rearrested as a result of new proceedings which had been instituted. He sought to obtain release on the ground that the proceedings were in violation of the fifth amendment to the Constitution and of the treaty with Great Britain. The Supreme Court of the United States denied release, stating:

Double
jeopardy;
res judicata

Collins contended that commitment on the new affidavits, after discharge in proceedings based on others identical in form and substance, was a violation of the Fifth Amendment and of the Treaty with Great Britain. The constitutional provision against double jeopardy can have no application unless a prisoner has, theretofore, been placed on trial. See *Kepner v. United States*, 195 U.S. 100, 126. The preliminary examination of one arrested on suspicion of a crime is not a trial; and his discharge by the magistrate upon such examination is not an acquittal. *Commonwealth v. Rice*, 216 Mass. 480. *People v. Dillon*, 197 N.Y. 254, 256. Even the finding of an indictment, followed by arraignment, pleading thereto, repeated continuances, and eventually dismissal at the instance of the prosecuting officer on the ground that there was not sufficient evidence to hold the accused, was held, in *Bassing v. Cady*, 208 U.S. 386, 391, not to constitute jeopardy. Likewise it has been consistently held under the

treaties with Great Britain and other countries, that a fugitive from justice may be arrested in extradition proceedings a second time upon a new complaint charging the same crime, where he was discharged by the magistrate on the first complaint or the complaint was withdrawn. The precise question appears not to have been passed upon by this Court in any case involving international extradition. But in *Bassing v. Cady*, *supra*, the rule was applied to a case of interstate rendition. Protection against unjustifiable vexation and harassment incident to repeated arrests for the same alleged crime must ordinarily be sought, not in constitutional limitations or treaty provisions, but in a high sense of responsibility on the part of the public officials charged with duties in this connection. The proceedings before the committing magistrate on the first and on the second set of affidavits, and the action of the Department of State on the latter, were no bar to the proceedings on the third set of affidavits here involved. The filing by the British Consul General of these new affidavits was clearly justified.

The discharge of Collins on the first petition for *habeas corpus*, so far as it related to the charge of obtaining property from Pohoomul Brothers and from Ganeshi Lall & Sons does not operate as *res judicata*. It is true that the Fifth Amendment in providing against double jeopardy, was not intended to supplant the fundamental principle of *res judicata* in criminal cases, *United States v. Oppenheimer*, 242 U.S. 85; and that a judgment in *habeas corpus* proceedings discharging a prisoner held for preliminary examination may operate as *res judicata*. But the judgment is *res judicata* only that he was at the time illegally in custody, and of the issues of law and fact necessarily involved in that result. The discharge here in question did not go to the right to have Collins held for extradition. It was granted because the proceedings on which he was then held had been irregular and the British Consul General, instead of undertaking to correct them, had concluded to abandon them, and to file the charges anew by another set of affidavits.

Collins v. Loisel United States Marshal for the Eastern District of Louisiana, 282 U.S. 426 429 (1923)

It is lastly contended that a former order of discharge in a *habeas corpus* proceeding between the same parties is *res adjudicata*. The facts upon which this contention is based are as follows: There were two hearings of the same charge before two different committing magistrates. On the former the only testimony offered by the Canadian government consisted of the affidavits and documents certified or authenticated by the American consul at Victoria, and in the first *habeas corpus* proceeding the court below held that such certification was unauthorized and void. The appellee was then held for further proceedings under another warrant. On the second hearing before the committing magistrate, the Canadian government offered the same documentary evidence, and also oral testimony to which we have referred in an earlier part of this opinion.

In the second habeas corpus proceeding, the court below adhered to its former ruling that the documentary evidence was not properly authenticated, and further held that the mode of authentication prescribed by the statute was exclusive, and that oral testimony was not competent. Assuming, without deciding, that the first order of discharge was *res adjudicata*, it could only be so as to the case then before the court. On the second hearing, as already stated, further competent testimony was offered by the Canadian government, sufficient in itself to make out a *prima facie* case, regardless of the certification by the consular officer. From this statement it becomes at once apparent that the order in the first proceeding was not a bar to the second proceeding, based as it was on different testimony.

Desmond, Sheriff, et al. v. Eggers, 18 F. (2d) 503, 506 (C.C.A. 9th, 1927).

The obligation of the United States to institute additional proceedings is not without qualification. In a case where the accused had been arrested three times, twice in extradition proceedings and once in deportation proceedings, the court said:

Indeed, it was conceded upon this hearing that the power on the part of the Government, and therefore its duty, to institute second proceedings, is not open to question. . . . It must be assumed that this obligation is binding upon this government until it can in all fairness say to the foreign government that any further attempt as against the petitioner to subject him to extradition proceedings is so subversive of the protection which this government desires to afford all within her borders, and is so repugnant to the principles recognized by this government in its own courts and toward its own citizens in the matter of arresting and examining alleged offenders, that the right of the German government to insist upon the performance of the treaty obligation has either been exhausted or can no longer be urged.

Ex parte Schorer, 195 Fed. 334, 338 (D.C., E.D. Wis., 1912).

The action of the Secretary of State in refusing to issue a warrant of surrender while *habeas-corpus* proceedings were pending was held not to be a bar to further proceedings in extradition involving the same crime but based upon a new complaint.

Collins v. Loisel, United States Marshal for the Eastern District of Louisiana, 262 U.S. 426, 430 (1923).

In connection with the case of Juan de Dios Rodriguez, whose extradition from Mexico on a charge of murder was requested by the Governor of Texas, the American Ambassador at Mexico City informed the Secretary of State:

Foreign Office informs me that while Rodriguez is still in custody amparo proceedings for his release have been begun. Their hope, on our request, was that this man might be held without question and extradited even though the papers arrived

out of time, they having reached here today, twenty seven days late.

Foreign Office says it has subjected itself to serious criticism because of its violation of the law in not ordering the man released when the forty days were up; that now the enforcement of the law which necessarily must follow the amparo proceedings will release the man, and the only way that he may be held is under rearrest on a new complaint giving other reasons for request.

The Ambassador was instructed:

This Government regularly re-arrests fugitives on same charge as that first preferred in cases where foreign governments do not present papers within detention period. This not extension of forty day period but re-arrest on same charge and beginning of new period. This recently done for Mexico in cases of George Deering Reed, an American citizen, and case of Matus Brothers. Mexican Government has in past taken equivalent action. See cases of Gabriel Morales and Alberto Cabrera and particularly your telegram of August 24, 1907 regarding latter. Unless in cases like present it is possible either to re-arrest or take some equivalent action extradition of criminals will be seriously hampered. Matter is one of grave concern. Since Rodriguez wanted for murder your suggestion regarding other reasons for arrest does not seem feasible.

The Ambassador replied:

Rodriguez extradition proceedings will go ahead in usual way the only condition is reciprocity, which is promised.

Ambassador Thompson to Secretary Knox, telegram received Apr. 6, 1909, and Mr. Knox to Mr. Thompson, telegram of Apr. 7, 1909, MS. Department of State, file 16948/21; Mr. Thompson to Mr. Knox, telegram received Apr. 12, 1909, *ibid.* /25.

A certificate issued by the Secretary of State that an application for the extradition of the person named therein has been made, is sufficient to enable the demanding government to initiate a new proceeding in extradition after the accused has been discharged under an original proceeding.

In re Schlippendach, 184 Fed. 783, 784 (D.C., S.D.N.Y., 1908).

BAIL

§333

The Supreme Court of the United States, in the case of *Wright v. Henkel*, 190 U. S. 40, 62-63 (1903), said:

Not only is there no statute providing for admission to bail in cases of foreign extradition, but section 5270 of the Revised

Statutes is inconsistent with its allowance after committal, for it is there provided that if he finds the evidence sufficient, the commissioner or judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. . . . and the same reasons which induced the language used in the statute would seem generally applicable to release pending examination.

We are unwilling to hold that the Circuit Courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief. Nor are we called upon to do so as we are clearly of the opinion, on this record, that no error was committed in refusing to admit to bail, and that, although the refusal was put on the ground of want of power, the final order ought not to be disturbed.

In the case of *In re Mitchell* the United States District Court for the Southern District of New York stated:

In this case the petitioner applies for bail under special circumstances. He has been arrested on extradition papers which have been issued from Canada and under which he is charged with what, in the state of New York, would be larceny. A warrant has been issued by Commissioner Alexander, and he is at present in the Tombs prison awaiting the final determination upon his extradition. The warrant was issued against him Thursday, June 24th, which was just upon the eve of a trial in the Supreme Court of the state of New York, in this county, in which he is the plaintiff and the moving parties in the extradition proceedings are the defendants. . . . The application is made to enlarge him upon bail for the reason that at present he is entirely unable to consult with his counsel and prepare for the remainder of the trial, which will consume, probably, the 28th, 29th, and 30th days of June. The application is opposed by the Canadian agent with much vigor, who contends that I have not the power to grant bail in such cases. My understanding of *Wright v. Henkel*, 190 U.S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948, is that the existence of the power was distinctly affirmed by the Supreme Court. The court at the same time clearly indicates its judgment that the power should be exercised only in the most pressing circumstances, and when the requirements

Temporary
release

of justice are absolutely peremptory; but still I cannot read that opinion without recognizing that the court understood the power to exist.

. . . In several cases in this district commissioners and judges have issued bail under similar circumstances, and while I quite agree with the learned counsel for His Majesty's government that the right is a dangerous one, and ought to be exercised with great circumspection, it seems to me that the hardship here upon the imprisoned person is so great as to make peremptory some kind of enlargement at the present time, for the purpose only of free consultation in the conduct of the civil suit upon which his whole fortune depends. Those special circumstances alone move me to allow him to bail, and his enlargement is to be limited strictly to the period of that suit. As soon as that is terminated he must be returned to the Tombs prison to await the determination of the commissioner upon the extradition proceedings. Until, however, that suit is terminated, I will order him released upon bail in the sum of \$3000. I am also moved to this disposition from the fact that he has long known of these proposed proceedings and has made no effort to avoid them or to escape.

In re Mitchell, 171 Fed. 289-290 (D.C., S.D.N.Y., 1909).

In a later case, the District Court of the United States for the Southern District of New York said:

We are dealing with a national of the demanding country. He seeks bail pending examination. Indisputably he is not entitled to it as of right. *Wright v. Henkel*, 190 U.S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948. Undoubtedly also the court has power to grant it. *Id.* Nevertheless, we have been admonished to exercise the power very sparingly and only when the justification is pressing as well as plain. *In re Mitchell* (D.C.) 171 F. 289; *U.S. ex rel. McNamara v. Henkel*, (D.C. S.D.N.Y. January 25, 1912), 46 F. (2d) 84, per Hough, J.

Here I see nothing out of the ordinary. Customarily, when removal is resisted, several weeks must intervene after arrest before any European foreign office is prepared to present evidence in support of its application. If, because of the time requisite to get from London proof that is to be offered before the Commissioner, the alleged fugitive were now enlarged on bail, then there should be bail, when asked for, in practically every international extradition case. If such a rule were adopted, not alone would the judges exceed the proper limits of their authority as declared by the highest court, but manifestly they would incur grave risk of frustrating the efforts of the executive branch of the government to fulfill treaty obligations.

The sole additional ground assigned for release during the interim while papers are awaited is the discomfort of the jail in which incarceration must be endured. That, however, is an unavoidable incident. One who voluntarily leaves his home shores for ours is subject alike to the disadvantages and the

advantages that ensue from any applicable provision of a treaty between the two states concerned.

Inasmuch as there are no unusual circumstances in the present case, I am clear, therefore, that bail should not be allowed.

In re Klein, 46 F. (2d) 85 (1930).

So far as the admission to bail of persons in the position of this relator is concerned, I see no reason to depart from the practice I have for some years adhered to—that the power to admit to bail exists is admitted; that it is ever advisable to admit to bail prior to the date of a reasonably early examination is denied. When the examination day comes and the complainant is not ready to proceed after having had a reasonable opportunity to communicate with the region from whence the request for extradition emanated, it is then time enough to ask for bail.

Yet even then it is not easy for me to conceive of circumstances that should move the court to admit to bail and not to dismiss the proceeding. In other words, admission to bail and extradition should be in practice an unusual and extraordinary thing, for the whole proceeding is opposed to our historical ideas about bail.

Bail is taken in all our courts on the theory of punishing, if not the accused, at least his friends, in the event of his absconding; but there the party seeking to inflict punishment is the commonwealth—state or national.

Persons accused of crime in foreign lands have not, presumably, violated the laws of this country; it is therefore absurd for our state or nation to collect money from the friends of the accused. If the bail, however, be so drawn as to cause the money collected on forfeiture to flow to the demanding government, the situation from an international view point is ridiculous, if not insulting.

United States ex rel. McNamara v. Henkel, Marshal, 46 F. (2d) 84 (S.D.N.Y., 1912).

A question arose in 1934 concerning the right, under the treaty of 1899 with Mexico, of Tomas Hernandez, Eduardo Villareal, and Henry Keene, who had been arrested in Texas with a view to their extradition to Mexico on a charge of kidnapping, to be released on bail pending the outcome of extradition proceedings. The matter having been referred to the Attorney General, Assistant Attorney General Keenan informed the Department of State as follows:

The decisions on the question would, therefore, seem to indicate that while bail for a fugitive is not a matter of right, the court may grant bail if the circumstances of the case seem to warrant that action.

The Assistant Secretary of State in a subsequent letter to the Attorney General stated:

Article X of the Extradition Treaty of 1899 between the United States and Mexico provides that in the case of a request for pro-

visional arrest and detention made through the diplomatic channels "each government shall endeavor to procure the provisional arrest of such criminal and to keep him in safe custody for such time as may be practicable, not exceeding forty days, to await the production of documents upon which the claim for extradition is founded". No such provision as to keeping the fugitive "in safe custody" is contained in Article IX of the Treaty, which provides for border state proceedings of extradition, and it is believed that the Mexican Government was influenced in its request for action through the diplomatic channel by the fact that in the border state proceedings theretofore conducted the fugitives had been admitted to bail, whereas in the apparent opinion of that Government as informally disclosed to this Department, bail is not permissible under the provisions of Article X of the Treaty. May I request that you direct Mr. Woodcock to call this situation to the attention of Judge Kennerly?

A copy of the last-mentioned letter was furnished to Judge Kennerly with a request for the issuance of a new order to take the accused into custody and to keep them in safe custody within the literal meaning of article X of the treaty of 1899. The record does not indicate what action was taken by the court on this request.

The Assistant Secretary of State (Moore) to the Attorney General (Cummings), Mar. 5, 1934, MS. Department of State, file 211.12 Hernandez, Tomas/28; the Assistant Attorney General (Keenan) to the Secretary of State (Hull), Mar. 14, 1934, *ibid.* /30; Mr. Moore to Mr. Cummings, Mar. 28, 1934, *ibid.* /38; Mr. Keenan to Mr. Hull, Apr. 10, 1934, *ibid.* /42.

Release
on bail
not allowed

At the hearing on May 29, 1934 before the United States commissioner for the Northern District of California in the matter of the application for the extradition to Canada of Joseph Carrero, charged with murder and receiving money knowing it to have been stolen, the attorney for the accused moved for his release on bail. The commissioner denied the motion, stating that "International extraditable cases are not bailable."

Transcript of Record, p. 2, MS. Department of State, file 211.42 Carrero, Joseph/3.

Secretary
of State
cannot
release
on bail

It is not within province Department of State to authorize acceptance bond for release of fugitive whose extradition is sought by a foreign government.

Secretary Kellogg to Senator Sheppard, telegram of July 13, 1925, MS. Department of State, file 211.12B731/2.

In 1930 the American Chargé d'Affaires ad interim at Mexico City stated that he had been informed by the Mexican Foreign Office that under Mexican law an alleged fugitive cannot be released on bail until a hearing has been held, after the receipt of extradition papers, on the request of the demanding government for extradition. Chargé Johnson to Secretary Stimson, telegram of Mar. 26, 1930, MS. Department of State, file 212.11 Harper, Joy B/16.

REVIEW

§334

In *Collins v. Miller, United States Marshal for the Eastern District of Louisiana* it was held that—

the proceeding before a committing magistrate in international extradition is not subject to correction by appeal.

252 U.S. 364, 369 (1920).

It is unnecessary to enlarge upon the doctrine, thoroughly established and recently re-stated, that in *habeas corpus* proceedings we are confined to the examination of fundamental and jurisdictional questions, and that the writ cannot be employed as a substitute for a writ of error. *Frank v. Magnum*, decided April 19, 1915, ante, p. 309.

Collins v. Johnston, Warden of the California State Prison, 237 U.S. 502, 505 (1915).

The Commissioner deemed the evidence sufficient to sustain the charge (Rev. Stat., §5270), and since he had jurisdiction of the subject-matter and of the accused, and the offense is within the treaty, his finding cannot be reversed on *habeas corpus* if he acted upon competent and adequate evidence. *McNamara v. Henkel*, 226 U.S. 520, 523.

Bingham v. Bradley, United States Marshal for the Northern District of Illinois, 241 U.S. 511, 516 (1916).

In case the magistrate issuing the warrant of arrest, and hearing the evidence, deems the evidence sufficient to sustain the charge under the treaty, he certifies the same, together with copy of all testimony taken before him, to the Secretary of State, and thereupon his function ceases. No appeal lies to any court from the acts or findings of such committing magistrate. *Collins v. Miller*, 252 U.S. 364, 40 Sup. Ct. 437, 64 L. Ed. 616.

Laubenheimer et al. v. Factor, 61 F. (2d) 626, 628 (C.C.A. 7th, 1932).

Even after the accused has been accorded a hearing before an extradition magistrate he often persists in his effort to resist surrender. A common practice in the United States is to request a hearing by the Secretary of State. While it is not specifically prohibited by law, it is not the practice of the Secretary of State to permit oral arguments by the accused or by his attorney. In lieu of such hearing the accused may be afforded an opportunity to submit a brief in opposition to surrender.

Adminis-
trative
authorities

An attorney, having received information to the effect that the Mexican Government had made application for the extradition of certain persons, requested that the Department of State give them,

through him as attorney, a hearing to protect them against the humiliation of an unnecessary arrest. The Secretary of State replied that—

the request is not one with which this Department can properly comply. Article X of the treaty of extradition between the United States and Mexico, a copy of which is enclosed herewith, provides that when certain formalities shall have been complied with "each Government shall endeavor to procure the provisional arrest" of the fugitive, to await his examination before an extradition magistrate. It will thus be seen that this Government is under obligation to the Mexican Government to initiate extradition proceedings upon compliance with the formalities prescribed by the treaty, and failure on the part of the United States to act in a case requiring such action might lead to serious consequences, involving even the denunciation of the treaty.

The Department has not been advised of the arrest of any of the fugitives mentioned in your letter. If the arrest is made at all, the fugitives will be given a hearing before the extradition commissioner, and the decision of the Commissioner, if adverse to the fugitives will be reviewed by the Department. The fugitives will also have their recourse to the Federal courts in habeas corpus proceedings, if in their judgment their treaty rights have not been respected.

Carlos Bee to Secretary Root, May 25, 1907, and Mr Root to Mr Bee, June 4, 1907, MS. Department of State, file 6443/2

After setting forth briefly the facts concerning the proposed extradition to England of Arthur Preston Green and Charles Rohrer, the latter's attorneys requested that the Secretary of State grant the defendants "a full re-hearing" and accord the attorneys "an opportunity to appear before you in a public hearing for the purpose of making an oral and written argument on behalf of Charles Rohrer". They were told that—

it is not the practice of this Department to hear oral arguments from attorneys in extradition cases which come before it for review, but if you desire to submit in writing a brief in behalf of your client, the Department will give careful consideration to any representations which you may think proper to submit.

Marx, Houghton & Byine to Secretary Root, May 15, 1907, and Acting Secretary Bacon to Marx, Houghton & Byine, May 20, 1907, MS Department of State, file 6551.

The extent to which the Secretary of State may review proceedings had before an extradition magistrate was set forth in a memorandum prepared by the Counselor of the Department of State in 1912, reading as follows:

Section 5270 of the Revised Statutes, following in part the language of Article X of the treaty of 1842, provides that the committing magistrate in case he deems the evidence sufficient

to sustain the charge shall certify the same, together with all testimony taken in the case "to the Secretary of State that a warrant may issue upon the requisition of the proper authorities of such foreign government for the surrender of such person according to the stipulations of the treaty or convention." This section has for many years been construed to vest in the Secretary of State, acting for the President, the authority to review the proceedings and evidence taken before the committing magistrate with a view to determining in general whether under all the circumstances affecting the case, both of a public and private nature, the warrant of surrender should issue. In the words of Judge Blatchford "it then rests with the President of the United States in the last instance, as the representative of the dignity and sovereignty of the United States, having in view its honor and the obligations of its treaties, as well as the obligation imposed upon him by the Constitution to 'take care that the laws be faithfully executed' and having before him the decision of the magistrate who has acted in the matter in the exercise of a jurisdiction conferred by an act of Congress, together with the evidence upon which such magistrate has acted, which decision and evidence are prescribed by law as the ground upon which the Secretary of State shall exercise his final judgment in the matter—to say whether the prisoner shall be surrendered to the demanding country or not. The intervention of the opinion of another judge rendered in a proceeding by *habeas corpus* upon the merits of the case may well be regarded by him as gratuitous and impertinent—an opinion wholly extrajudicial, which he is at liberty, in view of his own dignity and the mode prescribed by law in which he is to exercise this power, to regard or disregard, according to the opinion which he may entertain of the character of the judge or the circumstances of the case. The law provides him with a competent legal advisor in the person of the Attorney General and he is not obliged to seek advice in the opinions of judges thus rendered." (In re Stupp 12 Blatchf. 501).

The discretion of the Secretary of State exercisable upon such review has in the practice of the Department been considered as limited in certain directions in conformity with the above opinion of Judge Blatchford. It has been customary for the Secretary to confine himself to the facts of the case presented in the record which has been certified up to him by the committing magistrate. On this principle the Department has consistently refused to consider additional facts not appearing in the record whether presented to the Department on the part of the requesting government, or on behalf of the fugitive criminal. It will be observed, however, that this practice of the Department appears not to be based upon any statutory or treaty requirement other than that above mentioned.

In the second place the discretion of the Secretary of State is limited by the international obligation under our extradition treaties to surrender fugitive criminals, even though citizens of this country, who come fairly within the terms of such treaties.

Within these general limitations the Secretary of State may, it appears examine the case upon review and in his discretion refuse to issue a warrant of surrender upon various grounds. Apart from matters which the courts may rectify upon writs of habeas corpus and certiorari, he may deem the proceedings which have led to the commitment irregular, he may differ from the committing magistrate as to the weight or sufficiency of the evidence to support the charge and as to a question of treaty construction, he may elect between two or more concurrent demands for extradition of the same person, he may consider that the prosecution of the offense has been barred by lapse of time, and generally it seems he may refuse extradition on grounds of public policy bearing upon international relations. The inquiry of the Executive is untechnical and is directed to the determination of the broad question whether upon the merits, such a case has been made out as to require the surrender of the accused under the treaty. (1 Moore on Extradition 570).

Counselor Anderson to Secretary Knox, Feb. 3, 1912, MS Department of State, file 211.42R67/16.

Senator Edge enclosed with his letter of June 18, 1923 to the Secretary of State a letter received from an attorney representing Frank Swilly in the matter of the application of the Government of Canada for his extradition from the United States. The attorney desired that the Department of State request the Department of Justice, acting through the United States attorney for the District of New Jersey, to suggest to the court in which the proceedings were pending that it "refrain from signing any order at this time until the matter can be investigated by you [the Secretary of State]". He desired also that the Canadian authorities be approached with a view to obtaining depositions from four witnesses. The Acting Secretary replied that—

it is not the practice of the Department to concern itself with the details of extradition proceedings while they are pending before the committing judge or magistrate, and, therefore, I am constrained to state that the Department would not be justified in complying with Mr. Smith's request.

Senator Edge to Secretary Hughes, June 18, 1923, and Acting Secretary Phillips to Mr. Edge, June 20, 1923, MS. Department of State, file 211 42Sw5/1.

HABEAS CORPUS

§335

While the findings of an extradition magistrate, based upon competent legal evidence of the commission of the crime with which the accused is charged, are final and hence not subject to judicial review, this must not be construed as depriving the latter of all legal remedies

in the event that the magistrate has committed him to await the action of the Secretary of State.

The accused still has a right to petition the courts for a writ of *habeas corpus*, in order that the legal aspects of his detention and commitment may be considered and possibly resolved in his favor. Furthermore, he may urge upon the Secretary of State that his surrender should not be granted.

As a practical matter, the accused has three opportunities to attain his freedom: At the hands of the extradition magistrate, of the courts, and of the Secretary of State.

A writ of *habeas corpus* does not operate as a writ of error, and mere errors are not the subject of review. *McNamara v. Henkel, United States Marshal for the Southern District of New York*, 226 U.S. 520, 525 (1913).

A writ of *habeas corpus* cannot be used as a writ of error. If Judge Blair had jurisdiction of the person of the accused and of the subject-matter, and had before him competent legal evidence of the commission of this crime with which the appellant was charged in the complaint, which, according to the law of New Jersey, would justify his apprehension and commitment for trial if the crime had been committed in that State, his decision may not be reviewed on *habeas corpus*. *Terlinden v. Ames*, 184 U.S. 270, 278; *Bryant v. United States*, 167 U.S. 104; *McNamara v. Henkel*, 226 U.S. 520.

Charlton v. Kelly, Sheriff of Hudson County, New Jersey, 229 U. S. 447, 456 (1913).

It is unnecessary to enlarge upon the doctrine, thoroughly established and recently re-stated, that in *habeas corpus* proceedings we are confined to the examination of fundamental and jurisdictional questions, and that the writ cannot be employed as a substitute for a writ of error.

Collins v. Johnston, Warden of the California State Prison, 237 U.S. 502, 505 (1915).

The foregoing are general principles relating to extradition, but there are further limits to *habeas corpus*. That writ as has been said very often cannot take the place of a writ of error. It is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing and *habeas corpus* is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.

Fernandez v. Phillips, U.S. Marshal, 268 U.S. 311, 312 (1925); *United States ex rel. Hatfield v. Guay, U.S. Marshal*, 11 F. Supp. 806, 807 (D.C., D. N.H., 1935).

A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete. . . . And the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved.

Collins v. Miller, United States Marshal for the Eastern District of Louisiana, 252 U.S. 364, 370 (1920).

If the committing magistrate had jurisdiction of the subject-matter, and of the accused, and the offense charged is within the treaty, and there was evidence sufficient to establish the criminality of the accused for purposes of extradition, habeas corpus will not lie to review the action of the magistrate. *McNamara v. Henkel*, 226 U.S. 520, 33 S. Ct. 146, 57 L. Ed. 330; *Bingham v. Bradley*, 241 U.S. 511, 36 S. Ct. 634, 60 L. Ed. 1136. . . .

This is an appeal from an order of the District Court made in a habeas corpus proceeding and the function of this court is to review the record made before the District Court with a view to determining whether in that court reversible error intervened. The issue presented by the motion [of the accused to dismiss the appeal] cannot be raised on habeas corpus, and surely not on appeal therein.

We are aware of those instances where, even on appeal, matters may be shown, such as release of errors or settlement of the controversy, whereby further prosecution of the appeal and decision thereon would be moot and futile. But the motion does not present such a case. Here extradition is sought to be defeated through alleged transgression of the treaty by the demanding nation. This involves a question not judicial, but political. It would indeed be incongruous, and tend to incalculable mischief and complication, to accord to the various courts of the land power to inquire into and to pass upon the motives and conduct of foreign countries in their treaty relations with this country—a function peculiarly within the province of the state department of our government, and indeed made so by statute. 18 U.S.C. §§ 651, 653, 654.

Laubenheimer et al. v. Factor, 61 F. (2d) 626, 628 (C.C.A. 7th, 1932).

The American Chargé d'Affaires ad interim in Mexico, in a despatch to the Secretary of State in connection with the request of the Government of the United States for the extradition from Mexico of Louis Eisenberg, reported that—

the decision of the Supreme Court laying down in effect that amparo actions do not lie in extradition cases was not arrived at without considerable difficulty. In fact it was reported on the 9th instant that at a session of the court on the 8th the tribunal was equally divided on the questions of law involved, one of the justices being absent. The missing justice was sent for on the afternoon of the 8th instant and cast his vote against

Eisenberg's contentions in consequence of which the fugitive was delivered yesterday afternoon.

Chargé Schoenfeld to Secretary Kellogg, June 10, 1925, MS. Department of State, file 212.11Ei8/15.

With regard to the request in your letter of the 31st ultimo, that the Department suspend action pending the application which you propose to make for the release of the prisoner upon petition for habeas corpus, the Department would state that the issuance of a warrant for the surrender of Cox will have no effect on the judicial proceedings, inasmuch as the warrant of surrender cannot be executed before the determination of such proceedings and the final dismissal of the petition.

Issuance of
warrant need
not be
suspended

The Second Assistant Secretary of State (Adee) to O'Donnell, Dillon and Toolen, Nov. 5, 1907, MS. Department of State, file 9053/7; *Patrick Cox v. Luman T. Hoy*, 215 U. S. 619 (1909).

. . . it has been held by the courts that the issuance by the Executive of a warrant of surrender is not a bar to a judicial determination of the legality of the detention of a fugitive by *habeas corpus* proceedings.

The Acting Solicitor for the Department of State (Nielsen) to Addison S. Pratt and Morris Cukor, Oct. 5, 1915, MS. Department of State, file 211.42T78/6.

The question simply is whether there was any competent evidence before the Commissioner entitling him to act under the statute. The weight of the evidence was for his determination. The statute provides that if on the hearing, "he deems the evidence sufficient to sustain the charge," he shall certify the same to the Secretary of State and issue his warrant for the commitment of the accused pending surrender according to the stipulations of the treaty. Rev. Stat., §5270. Under this provision, the rule is well established that if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the treaty, and the magistrate has before him legal evidence on which to exercise his judgment as to the sufficiency of the facts to establish the criminality of the accused for the purposes of extradition, his decision cannot be reviewed on *habeas corpus*.

Competent
evidence

McNamara v. Henkel, *United States Marshal for the Southern District of New York*, 226 U.S. 520, 523 (1913).

If the Commissioner determined from this evidence that the draft was deposited for collection, as his opinion shows he did, and as we must assume he did in support of his order, we cannot in habeas corpus proceedings question the correctness of his conclusion, for there was clearly reasonable ground to believe the appellant guilty.

Ex parte Hammond, 59 F. (2d) 683, 685 (C.C.A. 9th, 1932).

Habeas corpus reaches only the question whether there was jurisdiction in the committing magistrate, whether the offense charged is within the treaty, and whether there was any evidence affording reasonable ground to believe the accused guilty. Jurisdiction exists under 18 U.S.C.A. §651, and the treaties with Great Britain on the subject of extradition. (8 Stat. 572; 26 Stat. 1508).

Bernstein v. Gross, Marshal, 58 F. (2d) 154, 155 (C.C.A. 5th, 1932).

The contention of Collins is that the evidence established only a broken promise or, at most, common-law cheating. It was not the function of the committing magistrate to determine whether Collins was guilty, but merely whether there was competent legal evidence which, according to the law of Louisiana, would justify his apprehension and commitment for trial if the crime had been committed in that State. *Charlton v. Kelly*, 229 U.S. 447, 456. If there was such evidence this court has no power to review his finding. *Ornelas v. Ruiz*, 161 U.S. 502, 508; *Terlinden v. Ames*, 184 U.S. 270, 278; *McNamara v. Henkel*, 226 U.S. 520.

Collins v. Loisel, United States Marshal for the Eastern District of Louisiana, 259 U.S. 309, 314-315 (1922).

In passing on the question of the right to review the finding of a commissioner in extradition proceedings, the Supreme Court of the United States said:

The question simply is whether there was any competent evidence before the Commissioner entitling him to act under the statute. The weight of the evidence was for his determination. The statute provides that if on the hearing "he deems the evidence sufficient to sustain the charge," he shall certify the same to the Secretary of State and issue his warrant for the commitment of the accused pending surrender according to the stipulations of the treaty. Rev. Stat., §5270. Under this provision the rule is well established that if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the treaty, and the magistrate has before him legal evidence on which to exercise his judgment as to the sufficiency of the facts to establish the criminality of the accused for the purposes of extradition, his decision cannot be reviewed on *habeas corpus*. *In re Oteiza y Cortez*, 136 U.S. 330, 334; *Renson v. McMahon*, 127 U.S. 457, 462; *In re Stupp*, 12 Blatchf. 501, *Ornelas v. Ruiz*, 161 U.S. 502, 508; *Bryant v. United States*, 167 U.S. 104, 105; *Terlinden v. Ames*, 184 U.S. 270, 278; *Grin v. Shine*, 187 U.S. 181, 192; *Yordi v. Nolte*, 215 U.S. 227, 232; *Elias v. Ramirez*, 215 U.S. 398, 407; *Glucksman v. Henkel*, 221 U.S. 508, 512.

McNamara v. Henkel, United States Marshal for the Southern District of New York, 226 U.S. 520, 523 (1913).

Porter Charlton, whose extradition was requested by the Government of Italy, sought to obtain his release on the ground that the committing magistrate excluded evidence of insanity offered by the accused. The Supreme Court of the United States stated:

Rejection
of evi-
dence

In this case the magistrate refused to hear evidence of insanity. It is claimed that because he excluded such evidence, the judgment committing appellant for extradition is to be set aside as a nullity, and the accused set at liberty. At most the exclusion was error not reviewable by *habeas corpus*. To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the Government.

We therefore conclude that the examining magistrate did not exceed his authority in excluding evidence of insanity. If the evidence was only for the purpose of showing present insanity by reason of which the accused was not capable of defending the charge of crime, it is an objection which should be taken before or at the time of his trial for the crime, and heard by the court having jurisdiction of the crime. If it was offered to show insanity at the time of the commission of the crime, it was obviously a defense which should be heard at the time of his trial, or by a preliminary hearing in the jurisdiction of the crime, if so provided for by its laws. By the law of New Jersey, insanity as an excuse for crime is a defense, and the burden of making it out is upon the defendant. *Graves v. State*, 45 N.J.L. 347; *State v. Maioni*, 78 N.J.L. 339, 341; *State v. Peacock*, 50 N.J.L. 34, 36. A defendant has no general right to have evidence exonerating him go before a grand jury, and unless the prosecution consents, such witnesses may be excluded: 1 Chitty Crim. Law, 318; *United States v. White*, *supra*; *Respublica v. Shaffer*, 1 Dallas, 236, 255; *United States v. Palmer*, 2 Cranch Circuit Court, 11; *United States v. Terry*, 39 Fed. Rep. 355, 362.

Charlton v. Kelly, Sheriff of Hudson County, New Jersey, 229 U.S. 447, 461-462 (1913).

Freeman Hatfield, whose extradition from the United States was requested by Canada, sought at his hearing to introduce in evidence certain Canadian statutes of limitation upon proceedings. This evidence was excluded by the committing magistrate. The accused, on *habeas corpus*, alleged that the rejection of the evidence was error. The Appellate Court, in passing on the question, said:

Statute of
limitations

If it were open to us, in a *habeas corpus* proceeding, to pass on the question of an alleged error in the reception or rejection of evidence, which we understand it is not, the petitioner not having shown that the sections referred to had anything to do

with the offenses charged, could not complain. Furthermore exemption from prosecution by lapse of time is a matter of defense to be taken up at the time and place of trial. If the Treaty of 1931 had been acceded to by Canada and was in force between the respective governments and there was evidence that exemption from prosecution had "been acquired by lapse of time, according to the laws of the High Contracting Party applying or applied to" under article 5 of that treaty it is probable that this court or the Secretary of State would be called upon to consider whether exemption from prosecution had arisen by lapse of time according to the laws of either country, and, if it had, to withhold extradition.

Hatfield v. Guay, U.S. Marshal, et al., 87 F. (2d) 358, 364 (C.C.A. 1st, 1937).

Objections
which should
be raised
at hearing

Objections which properly might be raised by an alleged fugitive at the hearing which is accorded him cannot be raised for the first time in *habeas-corpus* proceedings.

United States ex rel. Lo Pizzo v. Mathues, U.S. Marshal, 36 F. (2d) 565, 566 (C.C.A. 3d, 1929).

Trial on
charge other
than that
for which
extradited

Courts will not grant writs of *habeas corpus* in connection with extradition cases merely on the assumption that the accused if surrendered will be tried by the demanding government on a charge other than that for which surrendered. The United States Circuit Court of Appeals for the Fourth Circuit stated in this connection:

. . . If petitioner should be surrendered to answer the charge of kidnapping, there is no ground to apprehend that he will be tried on the charge of murder, as to which we have held that there was no substantial evidence of guilt. We cannot assume that a friendly government, in violation of article III of the Treaty of July 12, 1889 (26 Stat. 1509), would try the accused on any other charge than that for which he was surrendered to be tried. *Bingham v. Bradley*, supra, 241 U.S. 511, 514, 36 S. Ct. 634, 60 L. Ed. 1136; *Kelly v. Griffin*, 241 U.S. 6, 15, 36 S. Ct. 487, 60 L. Ed. 861.

Collier, United States Marshal v. Vaccaro, 51 F. (2d) 17, 21 (C.C.A. 4th, 1931).

Motives of
demanding
government

Here [in *habeas-corpus* proceedings] extradition is sought to be defeated through alleged transgression of the treaty by the demanding nation. This involves a question not judicial, but political. It would indeed be incongruous, and tend toward incalculable mischief and complication, to accord to the various courts of the land power to inquire into and to pass upon the motives and conduct of foreign countries in their treaty relations with this

country—a function peculiarly within the province of the state department of our government, and indeed made so by statute. 18 U.S.C. §§651, 653, 654 (18 USCA §§651, 653, 654); *In re Lincoln* (D.C.) 228 F. 70.

Laubenhheimer et al. v. Factor, 61 F. (2d) 626, 628 (C.C.A. 7th, 1932).

Habeas-corpus proceedings may be instituted by a person held for extradition to a foreign country when such foreign country does not, in accordance with the provisions of the statutes of the United States, remove the accused from this country within two calendar months from the date of commitment.

Failure to
remove
within
time-limit

The Assistant Attorney General (Stewart) to the Secretary of State (Colby), Mar. 31, 1920, MS. Department of State, file 211.12C271/9; 18 U.S.C. §654; Rev. Stat. §5273.

Charles Glen Collins, who was held for extradition to India, petitioned for a writ of *habeas corpus*. The writ was granted. Question arose as to the party entitled to appeal from the decision. The Supreme Court stated:

Proper party
to appeal

In what has been said we must not be understood as recognizing the British Consul General as the party entitled to appeal from a decision in Collins' favor. For the writ of *habeas corpus* was directed to the United States marshal who held Collins in custody and the marshal was the party in whom rested the right to appeal, if Collins prevailed on final judgment.

Collins v. Miller, United States Marshal for the Eastern District of Louisiana, 252 U.S. 364, 371 (1920).

In 1924 the Chargé d'Affaires ad interim of Great Britain requested the good offices of the Secretary of State in order that the Attorney General might be approached with a view to granting authority to the United States marshal at Chicago to take an appeal in the extradition case which had been instituted against Stewart Mulholland, if such became necessary on the decision in the *habeas-corpus* proceedings which were then pending. The Department of Justice informed the Department of State that—

Necessity for
authorizing
appeal

the Marshal was authorized, in the event of an adverse decision, to note an appeal on proper indemnification by the British authorities and forward immediately to this Department a copy of the petition and all papers in the proceedings.

The British Chargé d'Affaires (Brooks) to the Secretary of State (Hughes), July 9, 1924, MS. Department of State, file 211.42M89/1; H. S. Ridgely to Mr. Hughes, July 21, 1924, *ibid.* /4.

ESCAPE FOLLOWING ARREST

§336

To the extent that the treaties impose on the contracting states obligations to extradite, the asylum state is required to take all reasonable steps to prevent the escape of the fugitive prior to his actual surrender.

Section 5272 of the Revised Statutes of the United States, 18 U.S.C. §653, after making provision for the surrender of persons committed in extradition, provides:

If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape.

On March 24, 1909 the Ambassador of Great Britain requested the extradition of Milton A. C. Russell, charged in the Bahamas with larceny and embezzlement. On April 9 the Acting Secretary of State sent to the Ambassador a warrant for the surrender of the accused. Later, on May 21, the Ambassador informed the Secretary of State as follows:

From the report made by Sergeant-Major H. R. Biltcliffe who was sent by the Government of the Bahamas to receive the prisoner, it appears that he together with the British Vice Consul at Key West visited the Deputy United States Marshal, Mr. Johnson, in the evening of the 20th of April, and agreed to be at his office at 9 a. m. the following morning to make a formal demand for the surrender of the prisoner. This he did, but the Deputy United States Marshal informed him that he was in receipt of a communication of that morning's date from the Sheriff to the effect that Milton A. C. Russell had broken out of jail that night. Thereupon, at the suggestion of Sergeant Major Biltcliffe, the Marshal accompanied by himself and an Attorney appointed by the British Vice Consul, proceeded to the jail and made a demand on the jailer for the man. The warder on duty stated that the prisoner had escaped during the previous night, and at Sergeant Major Biltcliffe's request showed him the place where he had got out. This proved to be a window two of the iron bars of which had been sawn through about two inches from the bottom, and then pulled apart, leaving a space about 18 inches wide at the bottom and about six inches at the top, and about 15 inches high. Outside this window was a water tower made of lattice iron work, distant about 18 inches, thus forming a regular ladder to the ground, while in the yard below were a number of loose planks which would make it easier for a prisoner to scale the outside wall. Further, from statements made by the warder, it would appear that no system of night patrols existed, the

prisoners being locked up at 5 p. m. and not again visited until 5 a. m. Sergeant-Major Biltcliffe also observed that the filings made by cutting through the bars, which were still on the window sill, were greasy as though oil had been used during the operation of sawing the bars.

Further enquiry elicited the facts that the prisoner had not been confined in the cells proper, but had been allowed to wander about the corridors as he pleased, and that a number of persons had been in the habit of visiting him while he was in custody, without apparently any special precautions being taken to prevent them from conveying to him implements suitable for breaking prison.

As the prisoner had not been recaptured by the 28th of April the police officer left Key West on that date, the cost of his abortive mission having exceeded \$400.

Under these circumstances I cannot refuse to comply with the request of the Governor of the Bahamas, and therefore have the honour to bring this matter to your attention in the hope that you may think the case to be one in which it might be fitting to address representations to the Government of Florida as to the desirability of enforcing a stricter system of prison discipline.

In transmitting a copy of the note to the Attorney General, the Acting Secretary of State expressed the hope that—

the Department of Justice will be able to take appropriate steps to fix the responsibility for what seems to have been a dereliction of duty on the part of an United States officer and that every possible and proper endeavor will be made by your Department to obtain the re-arrest of the fugitive.

Ambassador Bryce to Secretary Knox, May 21, 1909, and Acting Secretary Wilson to Attorney General Wickersham, May 25, 1909, MS. Department of State, file 18073/5.

Pursuant to a request made in August 1906 by the Governor of New York, the Ambassador to Mexico was instructed to make formal requisition on the Mexican Government for the extradition of Raoul Auerbach, charged in New York with grand larceny. More than a month later the Ambassador reported that Auerbach had escaped from jail at Zacatecas and that the authorities were making efforts to re-apprehend him. The note from the Foreign Office stated:

The aforesaid Judge has been told that this Department presumes that the Government of the State will have adopted all measures possible to cause the re-arrest of the fugitive, and that the information concerning the results is expected.

The Ambassador addressed a note to the Minister of Foreign Affairs, stating:

In view of the expressions of the Governor of Zacatecas in his letter to Your Excellency under date of August 27, 1906, copy of which you sent me in your note of August 30th, the escape of this criminal is much to be regretted. It is my sincere hope

that he may be recaptured and such as are responsible for his escape dealt with as the case merits, as is intimated will be done.

With a despatch to the Department, the Ambassador enclosed a copy of a communication addressed to the Minister of Foreign Affairs by the district judge of Zacatecas in which it was stated:

Complying with your request of October 15, last, under No. 694, I have the honor to advise you that I have on this day received from the First Circuit Court, to which the case was referred to in appeal, the record of the process brought against Porfirio Mendoza and associates on a charge of favoring the escape of Raoul Auerbach, from which decision Mendoza had appealed, the higher court having in every respect sustained the sentence of the lower judge who acquitted Major Arnulfo Amado of the charge and assessed on Mendoza the penalty of seven months imprisonment, which he served already and was released on May 14, last.

Governor Higgins to Secretary Root, Aug. 20, 1906, and Acting Secretary Bacon to Ambassador Thompson, no. 98, Aug. 23, 1906, MS. Department of State, file 482; Mr. Thompson to Mr. Bacon, no. 202, Sept. 10, 1906, *ibid.* 482/5-6; Mr. Thompson to Mr. Root, nos. 262 and 688, Oct. 17, 1906, and Sept. 2, 1907, *ibid.* /10-15, /26.

LEGAL ASSISTANCE

§337

The usual practice is that, in the absence of a provision therefor by statute or by treaty, the government of an asylum state is under no obligation in extradition proceedings to provide legal assistance for the demanding state. The Assistant Attorney General of the United States, in informing the Secretary of State of the receipt of a letter from the United States attorney at Buffalo which reported the institution of extradition proceedings by the Italian Consul against Paul Viola, said:

The United States Attorney's attention has been called to the opinion of the Attorney General, to the effect that United States Attorneys are not obligated by an act of Congress to appear on behalf of foreign governments claiming extradition (9 Opin. Atty. Genl., 497).

The Assistant Attorney General (Luhrling) to the Secretary of State (Kellogg), Aug. 1, 1928, MS. Department of State, file 211.65 Viola, Paul/1.

An asylum state may, on the basis of reciprocity or as an act of comity, furnish legal assistance to the state demanding extradition. Such assistance was rendered in 1933 to the Government of Canada in compliance with a request made through the Canadian Minister

by the Attorney General of the Province of Alberta. In bringing the request to the attention of the Attorney General of the United States, the Under Secretary of State said:

There is no provision of treaty between the United States and Great Britain applicable to Canada for the rendering of assistance by the surrendering Government to the demanding Government in extradition proceedings, but I am forwarding the request . . . for such action as you may deem it appropriate to take thereon. In this relation I may say that I have requested the Canadian Minister to inform me whether in a reversed case the prosecuting authorities of the Province of Alberta would be disposed to render assistance to the United States.

The Assistant Secretary of State in a subsequent letter informed the Attorney General that—

in response to an inquiry made of the Canadian Minister, he has advised this Department in a note dated March 23, 1933, that the Attorney General of the Province of Alberta has stated that he would be prepared to extend like assistance to the Government of the United States in a reversed case and that, in fact, he has already given such assistance to the American Consul at Edmonton in several extradition cases.

The Canadian Minister (Herridge) to the Secretary of State (Hull), no. 31, Mar. 6, 1933, MS. Department of State, file 211.42 McLean, Kenneth and William/1; the Under Secretary of State (Phillips) to the Attorney General (Cummings), Mar. 10, 1933, *ibid.* /2; the Assistant Secretary of State (Carr) to the Attorney General (Cummings), Apr. 1, 1933, *ibid.* /7.

In as much as consular officers frequently are not attorneys and are, of course, not admitted to the practice of law in the particular jurisdiction in which they function, it not infrequently happens that in contested extradition cases they find the assistance of an attorney advantageous, if not essential. If this assistance is not furnished pursuant to statute or treaty, or as an act of comity or reciprocity, it may be obtained only by employment of a local private attorney. American Foreign Service officers are not authorized, in the absence of specific instructions, to incur such expense.

The Chargé d'Affaires ad interim in Canada (Riggs) to the Secretary of State (Stimson), no. 1328, Mar. 17, 1930, MS. Department of State, file 242.11 Macie, Louis /21.

Several of the extradition treaties to which the United States is a party require the rendering of legal assistance by the asylum state. Pursuant to the provisions of article XIII of the extradition convention concluded on June 15, 1904 between the United States and Spain, the "legal officers or fiscal ministry" of the country of asylum are

obligated to assist the officers of the demanding government in proceedings in extradition; no claim for compensation for the services rendered may be made against the government demanding extradition unless the officer concerned receives only specific fees for services performed, and not a salary, in which event the demanding government is required to pay the customary fee.

35 Stat. 1947; 2 Treaties, etc. (Malloy, 1910) 1712, 1717. To the same effect, see article XI of the treaty of July 12, 1930 between the United States and Germany, 47 Stat. 1862, 1870; 4 Treaties, etc. (Trenwith, 1938) 4216, 4220. See also articles VIII and XI of the convention of Feb. 22, 1899 between the United States and Mexico, 31 Stat. 1818, 1823, 1825; 1 Treaties, etc. (Malloy, 1910) 1184, 1187, 1188.

The assistant United States attorney for the Eastern District of Missouri sent to the Secretary of State authenticated copies of records of a Cuban court, together with copies of certain laws filed with his office in an extradition proceeding, and requested the Secretary to examine the enclosures and instruct him in the matter. The Department replied:

The Secretary of State would not be in a position to take any action regarding this matter unless, and until, he should have received from the Cuban Embassy a request for the extradition of this fugitive and have also received from the extradition magistrate, before whom the fugitive was arraigned, the record of proceedings had before such magistrate, as contemplated by the provisions of Section 5270 of the Revised Statutes.

It is presumed that you have received from a representative of the Republic of Cuba in this country a request that you assist his Government in the legal proceedings essential in this case, and, therefore, I advise you that while the extradition treaties in force between the United States and Cuba do not contemplate that such services shall be rendered by the legal officers of the surrendering government, the Department would have no objection to your giving such aid if you see fit to do so.

C. J. Stattler to Secretary Hull, Jan. 9, 1934, MS. Department of State, file 211.37 Benemelis, Manuel/1; the Assistant to the Legal Adviser of the Department of State (Metzger) to the United States attorney at St. Louis, Jan. 17, 1934, *ibid.* /2.

SURRENDER

AN EXECUTIVE FUNCTION

§338

It generally has been held, under section 5270 of the Revised Statutes of the United States, that the Secretary of State of the United States is the proper officer to pass upon the question of, and to issue warrants for, the surrender of fugitives from the justice of foreign countries.

The Secretary of State, in a note to the Ambassador of Great Britain in 1912 concerning the application of the Government of Canada for the extradition of Frank T. Root, stated that "after careful consideration of the transcript of the evidence and of the proceedings had before the extradition magistrate" it had been "decided that a case has not been made out justifying the issuance of a warrant of surrender" and that the Department was "therefore, constrained to decline the request of your Government for the extradition of the accused".

Secretary Knox to Ambassador Bryce, Feb. 10, 1912, MS. Department of State, file 211.42R67/14.

The United States commissioner for the Southern District of Florida enclosed with a letter to the Secretary of State a record of the proceedings had before him in the matter of the extradition to Cuba of Teobaldo Gou. The Counselor of the Department replied:

It is noted that by your order of January 3, 1914, the prisoner was apparently delivered into the custody of the Consul of Cuba for safekeeping and return to that country in accordance, as stated in your said order, with the treaty of extradition between the United States and the Republic of Cuba.

In this connection the Department desires to invite your attention to the following language contained in the last sentence of Section 5270 of the Revised Statutes of the United States, which reads as follows:

"If so held, such persons shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States."

Your attention is further invited to the provisions of Section 5272, Revised Statutes, with reference to the authority of the Secretary of State to order the delivery to a foreign government of a person committed for extradition.

Your action in delivering the prisoner to the Cuban authorities appears to have been entirely without warrant of law, whether or not the accused desired voluntarily to return to the jurisdiction of Cuba. If so requested by both the representative of the demanding government and the accused, you might well have suspended all proceedings in the case, leaving the accused free to return to Cuba if he so desired. Your only other alternative under the law in the case of one waiving examination and expressing a desire to return for trial to the country where the crime is alleged to have been committed, is to hold the accused for surrender on the order of the Secretary of State and to transmit to this Department your record of the proceedings, including an order of commitment.

Commissioner Crane to Secretary Bryan, Jan. 12, 1914, and Counselor Moore to Mr. Crane, Jan. 23, 1914, MS. Department of State, file 211.37G72.

James Lenord Belcher, a fugitive from the justice of Canada, during the course of a hearing before the United States commissioner at Fargo, North Dakota, signed and submitted to the commissioner a document reading in part as follows:

The above entitled matter having come on for hearing before the above named United States Commissioner, on the 15th day of April, 1916, at 10 o'clock a.m., and evidence having been submitted upon the part of the government of the Dominion of Canada, and I having submitted no evidence, and being desirous of now returning to the Province of Saskatchewan, Dominion of Canada, without further proceedings under extradition,

I do now waive the issuance of a warrant by the Secretary of State of the United States for my surrender, and do hereby consent to return to the Province of Saskatchewan, Dominion of Canada, in the custody of William Kay, Constable Royal Northwestern Mounted Police, and do hereby waive all further formalities of extradition proceedings in connection with my return.

The record of the proceedings had before the commissioner contains the following paragraph:

And now, upon the filing of said waiver aforesaid, I do in open Court direct the United States Marshal to deliver said James Lenord Belcher to William Kay, Constable of the Northwestern Mounted Police, for return to the Dominion of Canada; which said Marshal forthwith does, in open Court.

The Acting Secretary of State informed the United States commissioner that—

the Department is not aware of any authority of law under which you directed the United States Marshal to deliver the fugitive to the representative of the Canadian Government for return to Canada. Under Section 5270, Revised Statutes, it is provided that the surrender of fugitives from the justice of foreign governments shall be the prerogative of the Secretary of State alone.

Commissioner Green to Secretary Lansing, July 15, 1916, and Acting Secretary Polk to Mr. Green, July 22, 1916, MS. Department of State, file 211.42B41.

In the case of *Laubenheimer et al. v. Factor* the United States Circuit Court of Appeals for the Seventh Circuit stated that "Under our law, extradition is not a judicial function; it is reposed in the Department of State. 18 U.S.C. §651."

61 F. (2d) 626, 628 (1932).

It is noted that you state that your office is ready to surrender Benemelis to the Republic of Cuba. Of course, you have no authority to take any such action, and in this relation your attention is invited to the provisions of Section 5272 of the Re-

vised Statutes, wherein authority is granted to the Secretary of State to deliver persons to a foreign government in extradition proceedings.

The Assistant to the Legal Adviser of the Department of State (Metzger) to the United States attorney at St. Louis, Mo., Jan. 17, 1934, MS. Department of State, file 211.37 Benemelis, Manuel/2.

This [refusal of a writ of *habeas corpus*] does not mean of course, that the Secretary of State must surrender petitioner to the Canadian authorities. It means merely that the courts may not upon a writ of *habeas corpus* review the evidence and discharge the prisoner where he is charged with an offense covered by the treaty, where the committing magistrate had jurisdiction to commit him, and where there was competent legal evidence before such magistrate which warranted him in finding that there was probable ground to believe the prisoner guilty. Notwithstanding the discharge of the writ, the Secretary of State may review the evidence before the magistrate and decide whether the case presented is one calling for the surrender of the accused to the authorities of a foreign country. Rev. St. §5272 (18 USCA §653) ; 17 Ops. Attys. Gen. 184.

Executive
discretion

Collier, United States Marshal v. Vaccaro, 51 F. (2d) 17, 20 (C.C.A. 4th, 1931).

"It does not appear that the Secretary of State has ever decided to overrule an opinion of the Supreme Court of the United States in favor of the demanding government in an extradition proceeding. While it is undoubtedly true that the Secretary of State, acting for the President, could reach a conclusion contrary to that of the Supreme Court and act upon his own conclusion, it is admitted that he should refrain from so doing except for most urgent reasons." Memorandum of the Assistant to the Legal Adviser of the Department of State (Baker), Jan. 4, 1934, MS. Department of State, file 211.41 Factor, J./132½.

There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

Valentine, Police Commissioner of New York City, et al. v. United States ex rel. B. Colcs Neidecker, 299 U.S. 5, 9 (1936).

In replying to a request made by the Attorney General of Indiana that extradition to Canada of Hugh Emmons be refused on the ground that it would be in the interest of the State of Indiana to have the accused present in that State to testify in a pending suit, the Assistant Secretary of State said:

So far as concerns your objection to the fugitive's extradition, based upon your desire to use him as a witness for the State in a suit you have filed, it may be said that the treaties between the

United States and Great Britain applicable to Canada do not recognize this ground as constituting an exception to the obligation to surrender, and that it may perhaps be doubted whether the Canadian Government would be inclined to look with favor upon a request that it defer its application for extradition until the testimony of the fugitive had been given in the suit mentioned. However, the Department cannot undertake to forecast the attitude which the Canadian Government might assume in this matter, nor can it give any assurance at this time that it would be disposed to present the matter to the Canadian Government with a view to such delay.

The Assistant Secretary of State (Castle) to the Attorney General of Indiana (Gilliom), Feb. 21, 1928, MS. Department of State, file 211.42 Emmons, Hugh/4.

Before surrendering Francis Aiken and Charles Aiken to the Government of Canada on charges of murder, the Secretary of State inquired of the Governor of New York whether, under the laws of that State, there was an age-limit below which persons might not be placed on trial on a charge of murder in the first degree. When it was ascertained that there was no such limit, the accused were surrendered to the Government of Canada. In transmitting the warrant of surrender to the Ambassador of Great Britain the Secretary of State said:

The Department's information indicates that the fugitives are respectively eighteen and sixteen years old and in view of this, and having in mind also the recent execution, despite repeated representations by this Government, in the Province of Quebec, of Walter Muir, an American citizen, numerous reputable citizens residing in the section of the State of New York in which the Aiken brothers reside have addressed the Department in protest against the surrender of these boys for trial in Quebec and particularly Charles Aiken, the younger of the brothers.

The writers have informed the Department that there are extenuating circumstances in this case, especially so far as Charles Aiken is concerned. However, the record of proceedings had before the Extradition Commissioner does not contain any statements by the accused since they failed to testify.

Under all the circumstances it is deemed appropriate to communicate to your Embassy several copies of a letter addressed to the Department September 10, 1924, by Reverend George A. Armstrong, Pastor of the First Presbyterian Church of Plattsburgh, New York, who stated that he has visited the accused during their incarceration in jail at Plattsburgh and has learned their version of the events leading up to the killing and is convinced that it is truthful.

It will be observed that Mr. Armstrong sets forth that Charles Aiken states that just before the killing he left home with his brother to proceed to Glens Falls, New York, in search of work and that he had no intention of visiting Canada but was brought there by his brother and until his arrival in Canada had no knowledge that any offense, other than bootlegging, would be

committed, that he was not armed, was not immediately upon the ground when the shooting occurred, and took no part in it.

With relation to the part taken by Francis Aiken in the killing of Benton, the former has stated to Mr. Armstrong that his purpose in proceeding to Canada was to recover a quantity of jewelry valued at \$225, which he had deposited with Benton as security for the sum of \$36, and for the return of which Benton demanded \$150. Francis Aiken has further advised Mr. Armstrong that the shooting of Benton was accidental and that the discharge of the gun was caused by Francis Aiken's stumbling as he ran.

I beg to request that you will cause to be conveyed to the Canadian Government and the appropriate authority of the Province of Quebec, the information contained in this note and in Mr. Armstrong's letter.

This Government will observe with interest the proceedings had in Canada in the prosecution of Francis and Charles Aiken.

Secretary Hughes to Ambassador Howard, Oct. 8, 1924, MS. Department of State, file 211.42A141/2.

The Secretary of State having informed the Mexican Ambassador that the extradition of Henry Phillips Ames, an American citizen, had been denied on the ground of his American citizenship, the Ambassador replied:

. . . I have the honor to inform Your Excellency, in reply to the statement in your note of June 4 last, concerning the fact that the Mexican Government has, on several occasions, refused to surrender Mexican citizens whose extradition has been requested by Your Excellency's Government, that the Mexican Government has given me instructions to declare to you that it does not have, nor has it had the deliberate intention of refusing the extradition of Mexicans to the United States, simply because of their nationality, but that when it has refused extradition, it has been because of special circumstances and by virtue of the privilege granted by Article 4, yet never claiming criminal impunity since the Mexican authorities have begun the appropriate proceedings against them. In the special cases cited by Your Excellency, the circumstances were as follows.

José Méndez was acquitted by popular jury in November, 1924, by unanimous vote, and his extradition was refused, as the Department of [Foreign?] Relations advised the Embassy of the United States in Mexico, because in that period the Californian authorities judged a number of Mexicans, among them Albino Méndez and Mariano Cázares, with unusual severity and guided by deplorable racial prejudice, sentencing them to very harsh punishment, in spite of the deficiency of the proofs presented against them, the Mexican Government thus being forced to refuse the extradition mentioned.

Racial
prejudice

Ambassador Leal to Secretary Kellogg, Dec. 3, 1928, MS. Department of State, file 211.12Am3/25.

Joao F. Normano, arrested in Massachusetts in 1933 with a view to his extradition to Germany, sought to obtain his release through *habeas-corpus* proceedings, urging in support of the petition reports respecting the treatment accorded Jews by the existing regime in Germany. The District Court of the United States for the District of Massachusetts, in an opinion dated May 31, 1934, stated:

Whatever may be the situation in Germany, the Extradition Treaty between that government and the United States is still in full force, and it is the duty of the court to uphold and respect it just as it is bound to uphold and respect the laws and Constitution of the United States.

In re Normano, 7 F. Supp. 329, 330 (1934).

Release to
States

A fugitive who has been committed pursuant to extradition proceedings to await the action of the Secretary of State may not be released to the authorities of any State for prosecution therein without the consent of the Secretary of State. The Department of State expressed the same idea in a letter to the district attorney at Los Angeles. It stated:

The Department is of the opinion that in view of the fact that Garcia has been arrested in extradition proceedings at the request of the Mexican Government and has been committed to the custody of the United States Marshal to await the action of the Secretary of State, it would not be practicable for you to obtain his release from the Marshal's custody by Writ of Habeas Corpus. Ad Prosequendum to which you refer and that the only method by which Garcia could be released from the custody of the Marshal to your jurisdiction would be by the order of the Secretary of State.

The Solicitor for the Department of State (Hackworth) to the district attorney at Los Angeles (Fitts), June 25, 1930, MS. Department of State, file 211.12 Pacifico, Garcia/27.

Trial by
military
court

Subsequent to the date on which the Austro-Hungarian Ambassador requested the extradition of Moritz Ormai on charges of forgery and uttering of forged papers, it was ascertained that the accused was a deserter from the military forces of Austria-Hungary and that in the circumstances it would be necessary to try the accused before a military court. When this fact was brought to the attention of the Secretary of State by the Austro-Hungarian Ambassador, the Secretary replied that—

the Department understands from your note that Ormai will not be prosecuted on the charge of desertion, but will be tried for the offense for which this Government granted his surrender, namely, forgery. It is assumed that, if the occasion should arise in the future, the Government of Austria-Hungary will offer no objec-

tion to the trial before the military courts of the United States of a fugitive surrendered by that Government to the Government of the United States.

Secretary Knox to Ambassador von Hengervár, Apr. 17, 1911, MS. Department of State, file 211.630r5/5.

In 1937 the American Minister to Panama transmitted to the Department of State a copy of a communication addressed by the Secretary of the Navy to the Commandant of the Fifteenth Naval District in connection with a request of the Republic of Panama for the extradition of Edward William Eaton and James Neil Russell, mess attendants of the United States Navy, who were charged in Panama with the commission of a crime. The Secretary of the Navy stated:

It is the policy of the Navy Department not to approve requests for extradition of naval personnel for offenses committed in foreign countries while such personnel are serving with the Navy, as, generally, ample jurisdiction is vested in courts-martial for the trial and punishment of such offenses, and it is the apparent intention of Congress in view of Articles 8 and 23 of the Articles for the Government of the Navy that courts-martial should be given jurisdiction in such cases. There is no law or treaty requiring extradition of personnel of the Naval service in such cases.

The Office of the Legal Adviser stated:

The situation . . . seems to be that there is no provision of a statute or of an agreement . . . for any exception from the provisions for surrender of members of the Army or Naval force of the United States in the Canal Zone, other than as they may be excepted through the exercise of the discretion vested in the Governor of the Panama Canal in Section 882, Title 6 of the [Canal Zone] Code, with regard to the surrender of citizens of the United States.

As a practical matter this discretion in the case of applications for the surrender of members of the Army or Naval force would presumably be exercised by the Commanding General or the Commanding Naval Officer, respectively. That is clearly indicated in the instant case of Eaton and Russell. Nevertheless the discretion in cases of Army or Naval personnel would formally be exercised by the Governor, who would undoubtedly be governed by the decision of the officials just above mentioned.

Minister Summerlin to Secretary Hull, Apr. 13, 1937, MS. Department of State, file 819.0144/94; memorandum of the Assistant to the Legal Adviser of the Department of State (Baker), Apr. 28, 1937, *ibid.* /96.

OBSTACLES TO SURRENDER

§339

Statute of
limitations

Article III of the extradition convention of 1899 between the United States and Mexico (31 Stat. 1818, 1821; 1 Treaties, etc. [Malloy, 1910] 1184, 1186) provides that extradition shall not take place when the legal proceedings or the enforcement of the penalty for the act committed by the person demanded has become barred by limitation according to the laws of the country to which the requisition is addressed.

Pursuant to a request made by Mexico for the extradition of Juan Sanchez Azcona on a charge of swindling, the accused was brought before the Chief Justice of the Supreme Court of the District of Columbia, which issued an order reading:

This cause coming on for a final hearing upon the requisition of the United States of Mexico for the surrender of said Juan Sanchez Azcona, and upon the pleadings and the evidence adduced, and having been argued by counsel for the said United States of Mexico and for the said Juan Sanchez Azcona; and it appearing to the Court that the offense which the documents produced by the said United States of Mexico, in support of the requisition aforesaid, purport to set forth, is barred by the Statute of Limitations applicable thereto;

It is, by the Court, this 28th day of January, A.D. 1911,

ORDERED: That said requisition be, and the same is hereby, denied; and the complaint filed herein and all proceedings had thereon are hereby dismissed;

And it is further ordered that the said Juan Sanchez Azcona be, and he is hereby, discharged from further custody.

The Mexican Ambassador (De la Barra) to the Secretary of State (Knox), Nov. 26, 1910, MS. Department of State, file 211.12Az1; order of Chief Justice Clabaugh, *ibid.* 211.12Az1/9.

When the extradition of Alfonso M. Dávila, charged in Arizona with embezzlement, was sought, the request was refused by the Mexican Government, which stated:

Consistent with articles 101 and 102 of the Penal Code now in force, the prescription of the punishment or the penal action is fulfilled by the simple lapse of time designated by the law.

The same legal ordinance determines that the penal action shall lapse in a period of time equal to that of the term of imprisonment which corresponds to the crime, and that this term of imprisonment must be computed in accord with the arithmetical average.

As the crime with which Alfonso M. Dávila is accused carries a penalty of 3 days to 6 years imprisonment, article 382 of the Penal Code, the average of the penalty is 3 years and 2 days imprisonment.

As the accused committed the last crime with which he is charged on April 7, 1926, the penal action in his case lapsed on April 9, 1929.

The Mexican Minister of Foreign Affairs (Gonzalez) to the American Ambassador to Mexico (Daniels), Nov. 13, 1934, MS. Department of State, file 212.11 Dávila, Alfonso M/70.

There are several limitations upon the right of extradition as defined by the treaty. The question as to the evidence being usable in both countries has been considered in an opinion already filed. The conclusion of the Court is moreover that the crime alleged is substantially one which is known in both countries. There remains however the question whether there is any bar under the statute of limitations. Article VII of the Treaty [of April 6, 1904 between the United States and Cuba: 22 Stat. 2265, 2270; 1 Treaties, etc. (Malloy, 1910) 366, 369] applies the limitation prevailing in the country where the extradition is sought. That for the purpose of this case may be considered as governed by the Penal Code of Porto Rico.

Opinion of the court *In the matter of application of Rafael Martorell for writ of habeas corpus* (D.C., P.R., 1920), MS. Department of State, file 211c.37M36/1.

I have the honor to enclose a warrant for the surrender of L. C. Fulmer, charged with the embezzlement of public moneys of the town of Red Deer in the Dominion of Canada, and examined and committed for surrender by Augustus Armstrong, Commissioner in Extradition for the Western District of Washington.

Crime
charged
in request

The Commissioner has also committed the fugitive for surrender upon a charge of embezzling certain moneys from one Raymong Archambeault. Inasmuch, however, as no request for the extradition of Fulmer upon this charge was made by the Canadian Government or by its agent, and moreover, inasmuch as the request for his surrender upon this charge has not since been sanctioned or adopted by the Canadian authorities, the prisoner is not surrendered upon this charge but only upon the charge of embezzlement of the public funds of the town of Red Deer.

The Acting Secretary of State (Adee) to the British Ambassador (Bryce), Aug. 19, 1909, MS. Department of State, file 20422/1-2.

The Ambassador of Great Britain requested on May 7, 1907 the extradition to Canada of Charles F. Duffy on a charge of larceny. A few days later it was asked that if possible the request be amended and that the accused be extradited on a charge of larceny and theft. The Acting Secretary of State replied:

"The Department, after a study of the matter, decided to issue the warrant for the crime of larceny simply, rather than for larceny and theft, as requested in the Embassy's note of the 12th instant. It is thought that the first offense, certainly for the purpose of an extradition treaty embraces the second; and moreover the latter is not included in terms in any of our treaties." Ambassador Bryce to Secretary Root, no. 101, May 7, 1907, MS. Department of State, file 6365; the Second Secretary of the British

Embassy (Lindsay) to Mr. Root, no. 111, May 12, 1907, *ibid.* 6365/1; Acting Secretary Bacon to Mr. Bryce, no. 64, May 16, 1907, *ibid.* /2.

**Penalty of
bail bond**

Robert S. Hudspeth, an attorney representing Frank Kulkielski, who became surety on a bail bond for the appearance of Alexander Purzinski to answer an indictment brought against him in New Jersey, wrote to the Secretary of State explaining that the fugitive had been found in Russia and that it was his wish to have him returned in order that Kulkielski might recover the amount which he had paid upon the forfeited recognizance. The Assistant Secretary of State informed him that—

the extraditable offences enumerated in the extradition treaty between the United States and Russia do not include the offence of forfeiting a bail bond. Extradition for such an offence cannot, therefore, be requested of the Russian Government, and indeed the Department requires, before it will request the extradition of a fugitive from any government, that assurance be given that the extradition of the fugitive is not sought in order to avoid the penalty of a bail bond.

Robert S. Hudspeth to Secretary Root, Feb. 1, 1909, and Assistant Secretary Bacon to Mr. Hudspeth, Feb. 5, 1909, MS. Department of State, file 17769/-2.

At the instance of the Governor of New York, the Ambassador at London was instructed to request the arrest and provisional detention of Conrad Harms, charged in New York with forgery. The Ambassador transmitted to the Department of State the following letter from the Criminal Investigation Department, New Scotland Yard, London:

**Charges in
asylum state**

With reference to the case of Conrad Harms, for whose arrest a provisional warrant was issued at Bow Street Police Court, on the 3rd instant, for forgery committed within the jurisdiction of the Government of the United States of America, I have to acquaint you, for the information of His Excellency the American Ambassador, that Harms is identical with Conrad Harms, alias Clifford, who was arrested in this country on the 26th ultimo, on a warrant granted to West London Police Court, on the 8th June last, for forgery and fraud, committed to the prejudice of Messrs. J. S. Bache & Co., Bankers, New York.

The prosecution is being conducted by Mr. R. D. Muir, barrister, instructed by Messrs. Cohen & Cohen, Solicitors to Messrs. J. S. Bache & Co. The evidence against Harms is almost completed and in due course he will be committed to take his trial at the Central Criminal Court.

Under the circumstances it is impossible to execute the provisional warrant which appears to have been issued in connection with the same offence for which Harms is in custody in this country.

The secretary to the Governor of New York (Fuller) to the Secretary of State (Knox), telegram of June 29, 1909, and the Assistant Secretary of State (Wilson) to the Ambassador at London (Reid), telegram of June 30, 1909, MS. Department of State, file 20354; Mr. Reid to Mr. Knox, July 16, 1909, *ibid.* 20354/2-3.

Before instituting proceedings for the extradition of Milo Eggers to Canada, the Ambassador of Great Britain inquired whether, with reference to an indictment pending in California, the United States attorney at San Francisco would be prepared to waive his demand for the surrender of the accused by the Federal authorities at Tacoma, Washington, to enable the Canadian authorities to extradite him to Canada. The matter was referred to the Department of Justice, which stated that the United States attorney at San Francisco, California, was authorized to waive demand for the surrender of the accused with reference to an indictment pending against him in that district to enable the Canadian authorities to extradite him to Canada and that as far as his office was concerned the Canadian authorities could proceed with extradition proceedings.

Ambassador Howard to Secretary Kellogg, Mar. 11, 1926, MS. Department of State, file 211.42Eg3/1; Assistant Attorney General Luhring to Mr. Kellogg, Mar. 23, 1926, *ibid.* /2.

The Chargé d'Affaires ad interim of Canada requested in 1931 the extradition of Mike Radko, who was at that time serving a term of imprisonment in the Leavenworth penitentiary. In transmitting to the Chargé d'Affaires a warrant for the surrender of the accused, the Assistant Secretary of State said:

As the Legation is advised, Rudko [alias Radko] is at present serving a term of imprisonment in the Leavenworth Penitentiary following his conviction of a crime in this country. Therefore, the warrant cannot be immediately executed by the surrender of the fugitive. However, the Department has informed the Attorney General of the facts of the case as appearing from the record of proceedings before Judge Hopkins; has advised him that it is satisfied that a *prima facie* case of guilt has been made out by your Government, and that, therefore, it is sending you a warrant for Rudko's surrender. Finally, the Attorney General has been advised that it would be appreciated if he would give very prompt consideration to the question of the present commutation of Rudko's [sentence] and reach a conclusion favorable to such commutation so that Rudko may be surrendered to your Government.

The Chargé d'Affaires ad interim of Canada (Wrong) to the Secretary of State (Stimson), no. 7, Jan. 13, 1931, MS. Department of State, file 211.42 Radko, Mike/8; Assistant Secretary Carr to Mr. Wrong, Feb. 4, 1931, *ibid.* /13.

Parole

John Howell had been convicted and was serving a sentence in the State penitentiary at Walla Walla, Washington, when his extradition was requested by Canada. The attorney for the accused sought to avoid extradition on the ground that Howell's parole, which had been granted by the State of Washington, was void, so that the sentence imposed was still in effect. The Secretary of State informed the attorney as follows:

After careful consideration your brief in connection record of proceedings had before Judge Mills, Department has determined it is obligated by treaty provisions to surrender Howell, and has accordingly sent warrant to British Embassy.

Secretary Hughes to Earl W. Benson, telegram of Feb. 24, 1925, MS. Department of State, file 211.42H831/-.

Suspended sentence

Charles R. Pierce, general counsel of the Cuban Chamber of Commerce at Miami, transmitted on October 16, 1934 to the Secretary of State a copy of a memorandum prepared by William Hodge Morales for the Pan American Relations Bureau. The memorandum dealt with the question of the extradition of persons under suspended sentences growing out of criminal prosecutions. The Legal Adviser of the Department of State, in acknowledging the receipt of the letter and memorandum, said:

As is apparently recognized by Doctor Morales in the enclosure with your letter, the provisions of the extradition treaty between the United States and Cuba cover extradition based upon conviction of an offense listed in the treaty. Similar provisions are contained in the other extradition treaties of the United States and the Department is not aware of any good ground for believing that extradition could not be brought about in such cases even though the conviction had resulted in a suspended sentence. This being so, it does not seem that any alteration in the provisions of the extradition treaties of the United States is called for with respect to the question of suspended sentences.

Charles R. Pierce to Secretary Hull, Oct. 16, 1934, MS. Department of State, file 237.11/17; the Legal Adviser of the Department of State (Hackworth) to Mr. Pierce, Oct. 22, 1934, *ibid.* /18.

However, during 1937 the United States commissioner at Oklahoma City, after a hearing, ordered the discharge of William Frank Hollifield, whose extradition from the United States had been requested by Mexico. The Chargé d'Affaires of Mexico thereupon requested the Secretary of State to ascertain the grounds on which the commissioner based his decision. The Secretary of State in replying said:

The applicable provision in the Journal Entry of Judgment in the hearing in this case before the United States Commissioner at Oklahoma City reads as follows:

"The defendant stands charged in the United Mexican States of the crimes of falsification of official seals, use of the falsified seals, use of false documents, and fraud . . . upon which charge the United Mexican States seeks his extradition;

"That it developed during the hearing of this matter [that] the defendant had received a sentence imposed by the Northern District of Texas, in a mail fraud case, of one (1) year and one (1) day and a suspended sentence of five (5) years, a certified copy of said judgment and sentence being hereto attached and made a part hereof; that it was and is the intention of said Court, in passing the sentence, that the defendant remain in the jurisdiction of said Court during the duration of the suspended sentence, a letter from Honorable Clyde O. Eastus, United States Attorney, Northern District of Texas, being hereto attached and made a part hereof;

"That after a thorough study of the Treaty of the United States and the United Mexican States, and of the transcript of evidence forwarded through official channels, upon which the government of Mexico issued warrant for defendant Hollifield, and the Court being of the opinion that subject is not legally subject to extradition (See U. S. v. Greenhaus, 14 Fed. Sup. 368, 3d par. syl.),

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that by reason of law and by reason of the fact of not probable cause, the defendant, William Frank Hollifield, is hereby discharged.

"It is further ordered that the defendant, William Frank Hollifield be and he is hereby ordered and directed to report immediately to the Probation Officer of the Northern District of Texas."

You will observe that the basis for the refusal to hold Hollifield pursuant to the request made by your Government was the fact that Hollifield has not yet completed the term of the suspended sentence of five years imposed upon him by the United States District Court for the Northern District of Texas and that there was not probable cause. As the suspended sentence imposed on May 6, 1936, was directed to run concurrently with the sentence of one year and one day imprisonment imposed at the same time, the period of the suspended sentence will not expire until May 1941.

The Chargé d'Affaires ad interim of Mexico (Quintanilla) to the Secretary of State (Hull), July 28, 1937, MS. Department of State, file 211.12 Hollifield, William P./29; the Under Secretary of State (Welles) to Señor Quintanilla, Aug. 11, 1937, *ibid.* /30.

Article 4 of the Brazilian extradition law of June 28, 1911 provided:

If the penalty, which the person to be extradited will incur, be that of death or corporal punishment, according to the laws of the demanding country, extradition will be granted only on condition that said penalty be commuted to one of imprisonment.

Conditional
surrender

The Ambassador to Brazil (Dudley) to the Secretary of State (Knox), Aug. 28, 1911, MS. Department of State, file 211.32/2.

Immediately upon the signing on May 7, 1908, by plenipotentiaries of the United States and Portugal, of an extradition treaty, notes were exchanged to give effect to the understanding by Portugal, a country which did not impose the death penalty, "that the Government of the United States assures that the death penalty will not be enforced against criminals delivered by Portugal to the United States for any of the crimes enumerated in the said treaty, and that such assurance is, in effect, to form part of the treaty and will be so mentioned in the ratifications of the treaty".

In his note, the Secretary of State added:

In order to make this assurance in the most effective manner possible, it is agreed by the United States that no person charged with crime shall be extraditable from Portugal upon whom the death penalty can be inflicted for the offense charged by the laws of the jurisdiction in which the charge is pending.

The Senate of the United States in its resolution giving advice and consent to ratification specifically mentioned the foregoing understanding.

2 Treaties, etc. (Malloy, 1910) 1469, 1475-1476; 35 Stat. 2071, 2080-2081.

An exchange of similar notes was effected by the United States and Costa Rica when the treaty of extradition was concluded on Nov. 10, 1922. 4 Treaties, etc. (Trenwith, 1938) 4025, 4030-4031; 43 Stat. 1621, 1630.

In a note addressed by the American Minister at Bucharest to the Minister for Foreign Affairs of Rumania at the time of signing the extradition treaty on July 23, 1924, which note was made a part of the treaty, it was said that—

the undersigned Minister Plenipotentiary and Envoy Extraordinary of the United States of America at Bucharest . . . has the honor to confirm by this note . . . the assurance that the death penalty will not be enforced against criminals delivered by Rumania to the United States of America for any of the crimes enumerated in the said Treaty, and that such assurance is, in effect, to form part of the Treaty and shall be mentioned in the ratifications of the Treaty.

In order to make this assurance in the most effective manner possible, it is agreed by the Government of the United States that no person charged with crime shall be extraditable from Rumania to the United States, upon whom the death penalty can be inflicted for the offense charged by the laws of the country where the trial is pending.

The Senate of the United States, aware that Rumania did not impose the death penalty, advised and consented to the ratification of the treaty on the foregoing understanding.

4 Treaties, etc. (Trenwith, 1938) 4602, 4606; 44 Stat. 2020, 2028.

Article IV of the extradition treaty of January 19, 1922 between the United States and Venezuela, while reserving to the contracting parties the right to decline to grant extradition for crimes punishable by death and life imprisonment, is actually a recognition of a constitutional limitation on the right to surrender in such cases by Venezuela. The article reads:

In view of the abolition of capital punishment and of imprisonment for life by Constitutional provision in Venezuela, the Contracting Parties reserve the right to decline to grant extradition for crimes punishable by death and life imprisonment. Nevertheless, the Executive Authority of each of the Contracting Parties shall have the power to grant extradition for such crimes upon the receipt of satisfactory assurances that in case of conviction the death penalty or imprisonment for life will not be inflicted.

3 Treaties, etc. (Redmond, 1923) 2870, 2872; 43 Stat. 1698, 1702.

The attorneys representing Isidro Herrera, alias Sydney Smith, whose extradition to Mexico on the charges of murder and rape was requested by the Mexican Government, telegraphed on June 29, 1927 to the Secretary of State stating that they had an affidavit to the effect that if the accused were returned to Mexico he would be burned. The attorneys requested that execution of the warrant of surrender be stayed 10 days to enable them to file a petition for a rehearing. The Acting Secretary of State replied:

Summary
measures

Evidence referred your telegram June 29 can presumably be introduced on trial of Smith if surrendered and Department of State does not consider that it would be warranted in taking action you request but has telegraphed American Embassy, Mexico City, to ask Mexican Government to take prompt precautions to prevent summary measures against Smith and to assure that he will be given fair trial.

The accused was extradited on July 2, 1927 and was found dead on July 6, 1927 in the jail at Nogales, Mexico. The Mexican Foreign Office informed the American Embassy that the accused died of disease.

Elliott, Fickett, and Misbaugh to Secretary Kellogg, telegram of June 29, 1927, and the Acting Secretary of State (Olds) to Messrs. Fickett and Misbaugh, telegram of July 2, 1927, MS. Department of State, file 211.12H431/7.

Religious
belief

Although Roberto L. Ratto, charged with embezzlement, protested against his extradition from the United States to Mexico, asserting that, in view of his religious belief, it would not be possible for him to obtain a fair trial there and that his extradition was desired in order that he might be prosecuted for having permitted religious services to be conducted in his home, the Secretary of State issued a warrant of surrender to the Mexican authorities and in informing the attorney for the accused of this action invited attention to the provision of article XII of the convention of 1899 precluding the trial of an accused person for any offense other than that for which extradition was granted. It was added that violation of the religious laws was not made extraditable under the convention.

The Solicitor for the Department of State (Hackworth) to Homer A. Stebbins, Sept. 19, 1928, MS. Department of State, file 211.12 Ratto, R. L./39.

The attorneys for Isaak Lewin, otherwise known as Joao Frederico Normano, in urging in 1933 against his extradition from the United States to Germany, raised the point that, being a Jew, he would not receive a fair trial from the authorities then functioning in Germany. Joseph R. Baker of the Legal Adviser's Office of the Department of State, in commenting thereon, said:

... it may be stated that determination of this matter involves a question of policy which is not within the legal domain. However, it may be suggested in this relation that the provisions of the Extradition Treaty between the United States and Germany do not appear to afford any basis for refusing extradition on this ground. Possibly if it shall be decided that Lewin should be surrendered it would be appropriate to suggest in the note with which the warrant of surrender is transmitted to the German Embassy that objection has been raised to the surrender of Lewin on the ground that under existing conditions in Germany he could not hope to receive a fair trial and that the Department desires to have the German Government informed of this objection while not assuming that it is well grounded.

Memorandum of Apr. 4, 1933, MS. Department of State, file 211.62 Lewin, Isaak/22½. The sense of the foregoing was embodied in the note to the Embassy. *Ibid.* /23.

Time allowed
for departure

Stewart Donnelly was extradited from France to the United States. He later was discharged on his own recognizance on the recommendation of the district attorney of New York County at whose instance the extradition proceedings had been initiated. Within 30 days thereafter Donnelly was provisionally arrested and detained with a view to his extradition to Canada. The accused sought release on a writ of *habeas corpus*, contending that he had not been allowed 30 days to depart after his release, as provided in the treaty. The United States

Circuit Court of Appeals for the Second Circuit, in granting the writ, stated :

The United States could not have obtained the relator from France for the purpose of extraditing him to Canada. This was not the purpose for which the French government granted extradition or favored this country. If the United States had asked France to deliver up appellant for such purpose as it is now intended to exercise in granting Canada's request for extradition, France might rightly have refused. The treaty does not expressly forbid extradition to a third country, nor does it consent. In the absence of consent, the right to deny asylum to the criminal is that of France. There is an unrestricted right of refusal to consent to extradition from France to Canada in the former government. . . .

The appellant had a place of asylum in France and could be deprived of this only by the action of the French government. France, under international law, has a right to give him asylum or take it from him. Asylum necessarily means absolute immunity from the jurisdiction of another state, subject only to the will of the state of asylum, and it must be borne in mind that the right of the state of asylum is sovereign and unlimited, excepting in so far as the state freely imposes limits on itself. We are not advised officially whether or not France would deliver the appellant to Canada at the latter's request. Questions of treaty between Great Britain and France are involved. . . . France, as his state of asylum has a sovereign right to safeguard and protect its sovereignty, even though that may be construed as an injustice to the world; it has a right to decide for itself whether it will deliver the appellant, who sought its sheltering asylum, to a demanding state. The only impingement upon this asylum has been the extradition for trial of the indictment found against the appellant in New York. . . .

If a prisoner may not be subject to arrest on civil process after extradition from a foreign country (*In re Reinitz*, supra), by the same reasoning he cannot be arrested and held for extradition (not a criminal offense) to a third country.

It should be borne in mind that, while the *formalities* attending an extradition are purely administrative functions which the accused and the state of asylum can properly waive, the *diplomatic guaranties*—in the instant case, the 30-day period of immunity—which are accorded for the benefit of the accused, cannot be violated by the demanding state, without the consent of the surrendering state. Puente, Note on International Extradition, 26 *Ill. Law Review* (1931-1932) 210, 215.

Under the terms granting extradition, the prisoner has one month after he has been at liberty to leave the country and return to France. If at the end of that time he has not done so, the United States is free to consider the request of Canada for his extradition to that country.

United States ex rel. Donnelly v. Mulligan, U.S. Marshal, 74 F. (2d) 220, 222-223 (1934).

War

The Department has been informed by the French Government that, owing to the prevailing conditions of war, it is unable to carry out its treaty obligations with respect to the extradition of fugitives from the justice of the United States. Therefore, there can be no present question of the extradition of Coleas from France.

The Acting Solicitor for the Department of State (Nielsen) to the Tenney Candy Company, Mar. 23, 1915, MS. Department of State, file 200.11C67.

An order of discharge issued by a court of the United States following a hearing on a petition for release on the ground that the accused had not been removed from the United States within two calendar months after his commitment by an extradition magistrate, renders inoperative a warrant of surrender issued by the Secretary of State subsequent to the commitment.

The Assistant Secretary of State (Carr) to the Italian Ambassador (Martino), Oct. 8, 1926, MS. Department of State, file 211.65C49/—.

Technical defects

It is the policy of the Department not to refuse a warrant of surrender because mere technical irregularities are alleged in the proceedings had before the committing magistrate where such irregularities may be considered and corrected upon writs of habeas corpus and certiorari; and it would appear that the technical defects which you allege in the present proceedings are such as may be considered and passed upon by the courts under these writs.

The Acting Secretary of State (Wilson) to T. S. Burnett, Apr. 29, 1909, MS. Department of State, file 18202/10-11.

ARTICLES IN THE POSSESSION OF THE ACCUSED

§340

It is the practice of the United States to include in its treaties of extradition provisions concerning the seizure of articles in the possession of the accused at the time of his arrest in the asylum state. The provisions are not identical. Article X of the treaty of extradition concluded on May 6, 1931 between the United States and Greece is typical of the provision most commonly used. It reads:

Everything found in the possession of the fugitive criminal at the time of his arrest, whether being the proceeds of the crime or offense, or which may be material as evidence in making proof of the crime, shall so far as practicable, according to the laws of either of the High Contracting Parties, be delivered up with his person at the time of surrender. Nevertheless, the rights of a third party with regard to the articles referred to, shall be duly respected.

47 Stat. 2185, 2192; 4 Treaties, etc. (Trenwith, 1938) 4290, 4293. For other types of provisions, see article IX of the treaty of 1830 between the United States and Germany, 47 Stat. 1862, 1868 and 4 Treaties, etc. (Trenwith, 1938) 4216, 4219; and article XII of the treaty of 1931 between the United States and Great Britain, 47 Stat. 2122, 2125 and 4 Treaties, etc. (Trenwith, 1938) 4274, 4277.

In an instruction dated Jan. 28, 1927 to the American Ambassador at Berlin, it was pointed out that the provision of article 10 of the draft treaty of extradition then under negotiation, now contained in article IX of the treaty of 1930, cited *supra*, related to things "found in the possession of fugitives" and that it would not appear to comprehend things such as the proceeds of the crime not in his possession, as for example money deposited in a bank. It was stated that the question of the surrender of such other things would be a matter for judicial determination in a proceeding apart from that of extradition. The Under Secretary of State (Grew) to the Ambassador to Germany (Schurman), Jan. 28, 1927, MS. Department of State, file 211.62/46.

The British Ambassador made application under article IV of the convention of 1889 between the United States and Great Britain for the surrender of all articles found in the possession of Jack Cummings at the time of his arrest in San Francisco with a view to his extradition to Canada. The Acting Secretary of State informed the United States marshal:

In view of provisions of Article 4, Extradition Treaty of 1889, between United States and Great Britain, it is desirable to comply with request of British Government, and it is suggested that, provided no third party has taken legal steps to assert a right to this property, you present matter to Extradition Commissioner, Francis Krull, with a view to obtaining an order of said Commissioner to deliver said property to agent of Canadian Government, when fugitive is delivered to him to be taken from country, upon condition, if Commissioner approves, that agent shall sign a receipt setting forth that if, by judicial decision in United States, right of third party to possession of this property, or any part thereof, is sustained, the property, or such part thereof as is covered by decision, shall be returned.

Ambassador Barclay to Acting Secretary Polk, May 21, 1919, and Mr. Polk to the United States marshal (Holohan), telegram of May 26, 1919, MS. Department of State, file 211.42C91/3.

The Minister of Switzerland, in requesting the extradition of a fugitive, also requested that the latter's property be seized. The Secretary of State informed the Minister that—

If the Consul has not already done so, he should further request of the magistrate, in accordance with the provisions of Article 12 of the extradition treaty between the two countries, the delivery of all articles seized which were in the possession of the accused at the time of his arrest. As to the property not

in the possession of the accused, or which may be in the name of other persons or that of corporations, it will doubtless be necessary for the parties in interest to take appropriate proceedings in the courts for its recovery. It does not appear that this is a matter in which the United States District Attorney can properly take any action.

Minister Ritter to Secretary Knox, Feb. 24, 1913, and Mr. Knox to Mr. Ritter, Feb. 26, 1913, MS. Department of State, file 211.54B32.

Assignments

In connection with the extradition to Cuba of Ramon Llano, charged as an accessory to an embezzlement, the Minister of Cuba complained that the United States marshal at St. Louis, in delivering the proceeds of the crime to the Cuban Consul, retained the sum of \$700, claiming that this sum was subject to an action for fees by the attorney representing the accused. The Counselor of the Department of State, in bringing the matter to the attention of the Attorney General, explained:

It appears from the transcript of the proceedings had before the United States Commissioner that counsel for the accused presented certain assignments and orders signed by Llano in favor of said counsel for various sums amounting to over \$1,100.00, for fees, costs, and expenses in connection with the defense of Llano, and asked the Commissioner to direct that these amounts be paid out of the fund of over \$2,000.00 which was taken from the prisoner when arrested and which was held by the United States Marshal, but the Commissioner refused such request. Counsel for the accused also represented to this Department that this sum of about \$2,000.00, taken from the accused upon his arrest, belonged to him, and should not be delivered up with the prisoner. The Department in informing counsel for the defendant that it had been decided to issue a warrant for the surrender of Llano said:

"In respect of the claim made that a portion of the money taken from the accused upon his arrest, which the extradition magistrate ordered held to be delivered up upon the surrender of the accused, belongs to him, it may be observed that this is a matter for determination by the courts in a civil action."

The matter is submitted to you for such action as may be appropriate.

Minister Desvernine to Secretary Bryan, June 24, 1913, and the Counselor of the Department, J. B. Moore, to the Attorney General (McReynolds), June 27, 1913, MS. Department of State, file 211.37L77/12.

An attorney representing William and Maud Rodgers, whose extradition from the United States was requested by the Government of Great Britain, informed the Secretary of State that, subsequent to their arrest on charges of violating the laws of California but prior to their arrest with a view to their extradition, the accused had assigned to him \$400, which was taken from them by the local police. The United States commissioner had committed them for the action of the Secretary of State and had ordered that the \$400 be returned

to the demanding Government as proceeds of the crime. The attorney contended that under the treaty between the United States and Great Britain the order of the Secretary of State for the extradition of the accused and not the order of the United States commissioner was conclusive as to the return of the articles in the possession of the accused when apprehended and that unless the order of the Secretary of State specifically provided for the return of the money it would be the duty of the United States marshal to deliver the money to the assignee. The Acting Secretary of State replied:

It is not the practice of the Department, in issuing warrants of surrender for fugitives whose extradition has been determined upon, to make mention therein of the articles or proceeds of the crime which may have been the subject of an order by the Commissioner under Article IV of the extradition treaty of 1889 with Great Britain. The right of third parties thereto seems to be purely a judicial question, and the disposition of the \$400 which was found upon the persons of the accused and to which you make claim is a matter for the determination of the courts in litigation had for such purpose.

Carroll Cook to Secretary Knox, Aug. 9, 1911, MS. Department of State, file 211.41R63/4; Carroll Cook and William Hoff Cook to Mr. Knox, Aug. 24, 1911, and Acting Secretary Wilson to Carroll Cook and William Hoff Cook, Sept. 5, 1911, *ibid.* /10.

After the Acting Secretary of State had requested the Italian authorities to release L. A. Sabatina, whose extradition to the United States had been requested, the American Ambassador at Rome telegraphed to the Secretary of State:

Foreign Office inquires whether property and effects seized from Sabatina should be returned to him. He telegraphs that he is urgently in need of his personal effects.

The Department of State replied:

So far as this Government is concerned Sabatina stands in same position as if he had never been arrested, and there is no reason for not restoring his effects.

Ambassador Griscom to Secretary Root, telegram of Aug. 13, 1907, and Acting Secretary Adey to Mr. Griscom, telegram of Aug. 16, 1907, MS. Department of State, file 7511/11.

REMOVAL OF ACCUSED FROM THE COUNTRY

§341

Section 5273 of the Revised Statutes of the United States, 18 U.S.C. §654, provides that if a person who has been committed for extradition is not "delivered up and conveyed out of the United States within two

calendar months . . . it shall be lawful for any judge . . . upon application made to him . . . to order the person so committed to be discharged . . . unless sufficient cause is shown . . . why such discharge ought not to be ordered”.

The Justice of the Supreme Court of New York at Plattsburg issued an order on June 8, 1921 directing the Secretary of State to show cause why Joseph Laventure should not be released on account of the failure of the Canadian authorities to remove him from the jurisdiction of the United States within the prescribed time-limit. The Acting Secretary of State, in replying on June 14, stated :

The record of proceedings before the said Commissioner shows that in fact on March 31, 1921, he committed Laventure to jail to await the order of the Secretary of State of the United States in the premises. However, this record was not received by the Department of State until April 27, 1921, and it appears from a letter addressed to the Department by . . . John E. Judge on April 23, 1921, that following such order of the Commissioner, Mr. Judge, as attorney for Laventure, procured a writ of habeas corpus from the Honorable Frank Cooper, United States District Judge, on the return of which argument was had, and on April 18 the writ was dismissed and the prisoner committed to the custody of the United States Marshal.

In view of the foregoing, it would seem probable that before the record was transmitted to the Department it was brought before Judge Cooper for use in the habeas corpus proceedings. It would, therefore, seem to me that in determining whether there is cause why the discharge of the accused should not be ordered, the time which was consumed by such proceedings should be taken into consideration in determining his rights under the . . . provisions of Section 5273 of the Revised Statutes of the United States.

In view of the time consumed in the habeas corpus proceedings instituted by the accused, it would appear that Laventure would not be entitled to be discharged from custody under the proceedings which have been initiated before you.

I am not entirely clear as to the nature of the proceedings contemplated by the above-mentioned order to show cause received through the mails, but I hope that this communication may facilitate a proper disposition of the case.

Acting Secretary Fletcher to Justice Whitmyer, June 14, 1921, MS Department of State, file 211 42L39/7.

Joao F. Normano was arrested in January 1933 on complaint made by the German Consul General at Boston, with a view to his extradition. After a hearing before the United States commissioner at Boston, he was committed on March 4 to await action by the Department of State. On March 28 attorneys for Normano filed briefs in

opposition to surrender. In view of the treatment then being accorded Jews under the regime in Germany, the Department of State on May 3 asked the German Ambassador whether his Government would withdraw its request for the extradition of Normano. The Ambassador replied on May 27 that his Government was not willing to withdraw the request, and on May 29 a warrant of surrender, dated May 1, 1933, was sent to the Ambassador. Normano, still being in jail, filed on July 3, 1933 an application, under section 654 of title 18 of the United States Code, for discharge from custody on the ground that he had not been "delivered up and conveyed out of the United States within two calendar months" after his commitment. The court, in discharging him from custody, said:

While the language of the statute is that it shall be "lawful for any judge of the United States" to discharge out of custody the person demanded, I construe these words as tantamount to a mandate requiring the discharge unless sufficient cause to the contrary is shown. Normano had a right to expect of the court that it would do whatever Congress has declared lawful for it to do. Such a construction of the language employed I think is supported by the authorities. . . .

It is not incumbent upon the petitioner to provide a sufficient cause for extending the benefits of the statute. The person accused is entitled to the benefit of every statutory provision. . . .

On the contrary, the burden is upon those who resist the petition to present evidence which would justify the court in withholding the discharge after the expiration of the time limited.

In the case at bar, I am unable to discern any grounds which would constitute sufficient cause for retaining custody of Normano in these extradition proceedings. If the delay in delivering the warrant to the German Ambassador was caused by Normano, I should have no hesitation in regarding that as a sufficient cause for refusing the discharge, but from the undisputed facts in the case Normano cannot be charged with the delay subsequent to March 28, 1933. The delay from that time until May 3, when the State Department took the matter up with the German Ambassador, is not explained; nor is the delay from May 3 to May 27, when the Ambassador gave his reply to the request of Mr. Phillips. I do not conceive it my province to search out the cause for this delay. My responsibility ends when I find, as I do, that the delay is not attributable to any efforts on the part of Normano to postpone the time when he should actually be delivered to an authorized representative of the German government.

In re Normano, 7 F. Supp. 329, 331 (D.C., D. Mass., 1934). See also *In re Factor's Extradition*, 75 F. (2d) 10 (C.C.A. 7th, 1934).

Section 5272 of the Revised Statutes of the United States, 18 U.S.C. §653, provides:

It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to To whom delivered

such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly. . . .

In reply to representations opposing the surrender of an accused person for trial in Mexico City rather than in the State of Sonora, the Department of State said:

According to the view of the Department the Mexican Government has in this case duly established the commission of an offense covered by the Extradition Treaty between the two governments. Accordingly, the Government of the United States is obligated by treaty provisions to surrender the accused, and in fulfillment of that obligation, a warrant of surrender has been forwarded to the Mexican Embassy. That warrant does not provide for the return of the fugitive to the *State of Sonora*, but to *Mexico*.

The Second Assistant Secretary of State (Adee) to Charles Warren, Apr. 24, 1920, MS. Department of State, file 211.12G163/18.

Agent of
foreign
government

Your [the agent's] authorization need not be forwarded to Department but presumably should be presented to United States Marshal having custody of prisoner.

The Secretary of State (Hughes) to the Canadian agent (Irvine), telegram of Jan. 10, 1923, MS. Department of State, file 211 42St41/2.

Senator Guggenheim wrote to the Secretary of State on May 20, 1908 stating that the United States marshal at Denver had in his keeping a prisoner arrested for a murder committed in Austria-Hungary. The marshal desired to accompany the prisoner back to that country. Senator Guggenheim asked whether this could be arranged. The Secretary of State informed him that—

the Department on the 19th instant transmitted to the Austro-Hungarian Embassy its warrant for the surrender of Stephen Nemes Toth to the proper authorities of the Austro-Hungarian Government, who is to be returned to Hungary to stand trial for a murder alleged to have been committed by him in that country. The fugitive had been committed for surrender by a United States Commissioner at Denver. If this is the case to which your letter relates, it would appear that the Department's connection with the case has been terminated, since both by law and by treaty all further proceedings with respect to the return of the fugitive are under the direction of the Austro-Hungarian Government.

The Department can find no record of the case to which you refer, in which the United States Marshal at San Francisco accompanied a fugitive to Austria at the expense of the Austro-Hungarian Government. However, since in such a case the Marshal would have been acting as an agent of the Austro-Hungarian Government and not as an officer of the United States,

the correspondence might have been conducted directly between the Embassy and the individual in question, and not through the medium of this Department.

Senator Guggenheim to Secretary Root, May 20, 1908, and Mr. Root to Mr. Guggenheim, May 26, 1908, MS. Department of State, file 13737.

The Department observes that a duplicate commission executed under the seal of the State of Oklahoma, appointing the agent to receive the fugitive, appears among the papers. It should be stated that in cases of international extradition, the warrant authorizing the agent to receive the fugitive is signed by the President of the United States under the great seal of the United States. In such cases, it is only necessary for the Governor to designate the person whom he desires to be named as agent, and the Department will make the appointment in accordance with the Governor's suggestion. The Department would be pleased, however, where more than one person is designated, that the designation be made to include [all], rather than in the alternative form used in the Governor's application.

The Acting Secretary of State (Bacon) to the county attorney of Pittsburg County, Oklahoma (Dean), Apr. 18, 1908, MS. Department of State, file 12966/-2.

The agent designated by the Mexican Government to receive the surrender of an accused person, being unable to remain in the United States until the surrender could be effected, designated another person to act as agent on behalf of the Mexican Government. The Department of State took the position that no such right of substitution existed, stating:

In reply I beg to advise you that inasmuch as the warrant of the Secretary of State directed the Marshal to surrender Garcia to such person or persons as *might be duly authorized by the Government of Mexico* to receive the prisoner, and it appears that Bravo is not in possession of any such authority from the Government of Mexico, I am of the opinion that the Marshal would not be warranted in surrendering Garcia to Bravo, under the attempted delegation of authority from Zambrano to Bravo, or by virtue of the latter's appointment as Consul General of Mexico to San Francisco.

I am further of the opinion that the Marshal would be warranted in surrendering the prisoner, under the warrant above mentioned, to any person or persons who may be designated to receive the prisoner by the person exercising *de facto* authority under the title of Provisional President of Mexico.

The Government of the United States has not recognized the present Provisional Government of Mexico, but it seems to me that this lack of formal recognition need not prevent the Marshal, under the circumstances, from honoring the designation of an agent in this case, by the person exercising *de facto* authority in Mexico.

The Acting Secretary of State (Adee) to the Attorney General (Palmer), July 3, 1920, MS. Department of State, file 211.12G163/19

Agent
of U.S.

With respect to agents appointed on behalf of the United States to receive the delivery by a foreign government of persons accused of crime, section 5276 of the Revised Statutes of the United States, 18 U.S.C. §660, provides:

Any person duly appointed as agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the jurisdiction of the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping.

The agent mentioned must be appointed by the President, although the nomination is made by the Governor of the State or by the Attorney General of the United States, as the case may be.

. . . It is expected that agents in extradition cases should report to the American Legation or Consulate, as the case may be, and put themselves in touch with American officers there. The Department usually instructs the agent to this effect, either orally or in writing.

The Chief Clerk of the Department of State (Carr) to the Consul General at Montreal (Bradley), Mar 19 1908, MS. Department of State, file 12198/4.

At the request of the Governor of Iowa, extradition proceedings were instituted with a view to the return from Canada of James Jones, charged in Iowa with murder. The court decided to waive extradition and was surrendered to the custody of the agent appointed by the President to receive him. Following the agent's return he addressed a letter to the Department of State requesting that he be given all papers relating to the case in order that he might make his return thereon. The Department of State informed him that—

the Department has received from the Consul at Victoria, British Columbia, the papers in the extradition case of James Jones from Canada. The Department is inclined to think you are not fully informed in this matter, as it is not required of agents in extradition cases to make returns to this Department and in cases where the papers are used to secure extradition they are retained among the records of the court granting the extradition.

The requisition clerk of Iowa (Wood) to the Secretary of State (Knox), June 26, 1909, MS. Department of State, file 20310/-1; Agent Griffin to Assistant Secretary Wilson, Aug. 12, 1909, and the Chief Clerk (Carr) to Mr. Griffin, Aug. 25, 1909, *ibid.* /6.

Section 5270 of the Revised Statutes of the United States, 18 U.S.C. §651, provides for a hearing for the accused in extradition and, in the event that the evidence is deemed sufficient to sustain the charge under the treaty or convention, for the issuance by the magistrate of "his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made". The law is otherwise silent as to the place where the surrender shall take place.

Place of
surrender

Following the issuance of a warrant for the surrender to Canada of Basil C. D'Easum on a charge of larceny, the Attorney General transmitted to the Secretary of State a copy of a telegram received from the United States marshal at Helena, Montana, reading as follows:

Extradition warrants from Secretary of State de Easum and Johnson direct me only to surrender [...] Canadian receipias [*sic*] directs its officers to receive prisoners held at Helena. Shall I surrender prisoners here or conduct to international boundary and there surrender?

The Acting Secretary of State informed the Attorney General:

Neither statutes nor treaty provide or apparently contemplate surrender at international boundary. On the contrary, Revised Statutes fifty two seventy two appears to contemplate delivery at place where fugitive has been committed for surrender. Department seems to have always acted in accordance with this view, notably in the recent case of George Deering Reed, extradited to Mexico, the procedure in that case being adopted after an informal conference between representative of this Department and Assistant Attorney General Sanford, representing Department of Justice.

The Attorney General (Bonaparte) to the Secretary of State (Root), telegram of June 22, 1908, and Acting Secretary Adee to Mr. Bonaparte, telegram of June 23, 1908, MS. Department of State, file 13398/5.

In 1928 the United States marshal for the Northern District of Ohio stated that the Italian Consul had requested him to deliver Francesco Trimarco, a fugitive whose extradition had been granted, to the captain of a steamship at New York; he requested instructions as to the procedure to be followed. The Department of State informed the Attorney General in this regard that the Italian Embassy's attention had been called to the provisions of sections 5272 and 5273 of the Revised Statutes and to the language of the warrant of surrender; that it had been pointed out that the statutes appeared to contemplate the delivery of the fugitive at the jail to which he was committed to a person authorized to receive him by the Government of Italy; and

that the Embassy had been informed that there appeared to be no authority of law for the marshal to convey the fugitive to New York.

The Assistant Attorney General (Luhning) to the Secretary of State (Kellogg), Mar. 2, 1928, MS. Department of State, file 211.65T73/4; the Assistant Secretary of State (Castle) to the Attorney General (Mitchell), Mar. 5, 1928, *ibid.* /6.

Port of
embarkation

Occasionally a representative of a demanding government will make arrangements with United States marshals or other officers to whose custody a fugitive criminal has been committed by an extradition magistrate for the delivery of such fugitive to an agent of the demanding government at the seaboard in the United States. While the Secretary of State interposes no objection to such arrangements, the demanding government must assume any risk of escape by the fugitive during the period of his transportation from the place of detention to the seaboard.

Secretary Stimson to the Italian Ambassador (De Martino), June 18, 1930, MS. Department of State, file 211.65 Baldassare, Bellomo Scili/9.

In December 1928 the Ambassador of Italy requested "that the Department kindly use their good offices to the end that the competent Federal Police Authorities in the State of Rhode Island where Carmine and Michele Di Lorenzo are detained, receive instructions to deliver these fugitives to the Captain of the S/S 'President Wilson' at the port of Boston, on or before December 28th". The Secretary of State replied that—

on November 26, 1928, a warrant was sent to the Ambassador for the surrender of these fugitives ". . . to such persons as may be authorized to receive them in behalf of the Government of Italy."

It may be added that the record of the proceedings had before the Extradition Magistrate in this case indicates that the fugitives have been committed to the custody of the Marshal of the District of Rhode Island at the jail of Providence County in that state and that the Secretary of State would have no objection to such arrangements as the Italian representatives in this country might be able to make with the Marshal in reference to the surrender of the fugitives to a person authorized to receive them at some place other than that in which they are confined, but the Secretary of State is not in a position to intervene in this matter.

The Italian Ambassador to the Department of State, Dec. 14, 1928, MS. Department of State, file 211.65L881/6; the Department of State to the Italian Ambassador, Dec. 17, 1928, *ibid.* /7.

The Governor of Hawaii transmitted to the Secretary of State through the Secretary of the Interior a request for the extradition from Japan of Yoshitaro Abe, charged in Hawaii with forgery. The

extradition papers were transmitted to the Japanese Government through the American Ambassador in Tokyo, who telegraphed the Department:

Abe case. Favorable action by Court Dalny.

Prisoner being conveyed Yokohama for delivery to Hawaiian officer on board steamship *China* sailing 23rd.

Ambassador O'Brien to Secretary Root, telegram of Dec. 17, 1908, MS. Department of State, file 15984/13.

The Austro-Hungarian Ambassador requested the extradition of Bela Walder, who had been prosecuted in Hungary for the forgery of promissory notes and bills of exchange. Following a hearing before the United States commissioner at Chicago, a warrant was issued by the Acting Secretary of State for the surrender of the accused. Before returning the warrant of surrender to the Department of State, the United States marshal, acting through the deputy marshal, made the following notation on the warrant:

I have executed this writ by delivering the body of the within named Bela Walder, alias Bela Webster, to the Honorable Barron Otto Hoenning O'Carroll, Imperial and Royal Consul General of Austria Hungary in the City of New York, N.Y., on the 25th day of November, A.D. 1908.

The Austro-Hungarian Ambassador (Von Hengervár) to the Secretary of State (Root), Oct. 7, 1908, MS. Department of State, file 15969/1; warrant of surrender, *ibid.* /7.

RECALL OF WARRANT

§342

The attorneys representing Millard K. Davis submitted a petition to the Secretary of State requesting that the warrant of surrender of the accused to Mexico on a charge of murder be recalled. The Department of State informed them:

The warrant for the surrender of fugitive Davis was delivered to the Mexican Ambassador and is beyond the control of the Department. It is not considered that its return could properly be requested.

Messrs. Utley and Conkling to Secretary Stimson, July 24, 1931, MS. Department of State, file 211.12 Davis, Millard K. Kootz/27; the Legal Adviser of the Department of State (Hackworth) to Messrs. Utley and Conkling, Aug. 12, 1931, *ibid.* /28.

Representative Rogers informed the Secretary of State that the friends of Isaak Lewin, alias Joao Frederico Normano, were anxious

to have the warrant of surrender issued for his extradition to Germany recalled. The Acting Secretary of State said in reply:

The Secretary of State has sent to the German Ambassador a warrant for the surrender of the fugitive since the evidence introduced by the German Government made out a *prima facie* case of guilt against him. However, this action was not taken until the receipt from the Ambassador of assurances that Lewin would be given a fair trial in Germany and that the fact that he is a member of the Jewish race would not operate to prejudice the courts against him.

It will therefore be seen that the case is closed so far as the Department of State is concerned.

Representative Edith Nourse Rogers to Secretary Hull, June 6, 1933, MS. Department of State, file 211.62 Lewin, Isaak/25; Acting Secretary Phillips to Mrs. Rogers, *ibid.* /31.

TRANSIT

The laws of the United States contain no provision for the transit of the United States by foreign agents having in custody fugitives from the justice of other countries whose surrender has been granted by third countries. In cases of extradition from the United States, however, section 5272 of the Revised Statutes, 18 U.S.C. §653, after providing for surrender of the accused by the Secretary of State to such person as shall be authorized in the name and on behalf of the foreign government, continues:

. . . it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign government, pursuant to such treaty.

Article I of the treaty concluded on May 18, 1908 between the United States and Great Britain (1 Treaties, etc. [Malloy, 1910] 830; 35 Stat. 2035) provides:

"Any officer of the United States of America or of any state or territory thereof, having in his custody without the borders of Canada, by virtue of any warrant or any other lawful process issued by authority of the United States or of any state or territory thereof, any person charged with or convicted of any of the criminal offences specified below, committed within the jurisdiction of the United States or of any state or territory thereof, may, in executing such warrant or process, convey such person through any part of Canada to a place in the United States, if such warrant or process is endorsed, or backed, by a judge, magistrate or justice of the peace in Canada, or if the authority of the Minister of Justice of Canada for such conveyance is first obtained.

"During such conveyance of such person through Canada, such officer may keep such person in his custody, and in case of escape may recapture him."

Similar provision is made with respect to the transit of prisoners through the United States to Canada.

The same article provides:

"The foregoing provision shall apply only to persons charged with or convicted of offences of the following descriptions:

"1. Offences for which extradition is at the time authorized by a treaty in force between the United States and Great Britain.

"2. Assault with intent to commit grievous bodily harm.

"3. Assault upon an officer of the law in the execution of his duty."

In consequence of the theory of English and American jurisprudence regarding the territoriality of crime, no person can lawfully be arrested or held in custody in this country for a crime committed outside of its jurisdiction, except as provided by statute or by treaty.

The laws of the United States contain no provision authorizing the detention or custody of a fugitive in transit between two foreign countries from which and to which he is being extradited, and the only authority for such detention, would therefore be a provision of treaty. The only treaty to which the United States is a party which provides for the question of transit is the treaty with Mexico. In other cases, even though the Government to which the fugitive is being returned may have a treaty in force with the United States covering the crime for which the fugitive is being surrendered, this Government is bound to surrender such person only upon compliance with the treaty requirements, which are not fulfilled in the ordinary case of transit across its territory. Therefore the only way a prisoner under such circumstances can in the full strictness of the law be conveyed across United States territory is for the demanding government to institute formal extradition proceedings in this country in accordance with treaty requirements.

The existence of this rule in other countries has sometimes necessitated the making of special arrangements for the return of a fugitive where the vessel conveying him must stop at an intermediate port. In one case the Department applied, through the diplomatic channel, to the Government of the authorities of such port for the provisional detention of the fugitive, in case he should attempt to secure his release upon *habeas corpus* or analogous proceeding. Once, in a case of transit across the Isthmus of Panama in 1888, the fugitive was permitted to escape altogether. For. Rels. 1878, page 151.

Many of the States of Europe and South America have enacted laws so as to permit transit through their territory, upon more or less liberal conditions. Some provisions stipulate that the request shall be made through the diplomatic channel, and some require the presentation of the documents forming the basis of the demand for the extradition. In England the practice is the same as in the United States. In 1878 the American Minister at London was told by the British Foreign Office, regarding the contemplated transit through British jurisdiction of an American fugitive surrendered by Portugal to the United States, that if he were landed in England he would be "entitled to apply for a

habeas corpus, and if the Judge decided he was not in lawful custody he would be set at liberty."

The question of the amendment of our extradition statutes so as adequately to cover the situation under discussion has twice been made the subject of recommendations to Congress by the President. In his second annual message of December 6, 1886, President Cleveland said:

"Experience suggests that our statutes regulating extradition might be advantageously amended by a provision for the transit across our territory, now a convenient thoroughfare of travel from one foreign country to another, of fugitives surrendered by a foreign government to a third State. Such provisions are not unusual in the legislation of other countries, and tend to prevent the miscarriage of justice."

and President McKinley in his second annual message of December 5, 1898, renewed the recommendation of his predecessor (Rich. Messages Vol. 10, page 187), but no legislative action resulted in either case.

The foregoing observations, it will be noted, have been addressed to the strict question of law, as to whether or not the government has a *right to demand* that a fugitive, under the circumstances stated, be set at liberty. A distinction is, however, made in practice between the existence of this right and its exercise by the United States. This Department, as a matter of practice, does not in these cases interfere to secure liberty for a prisoner by reason of a technical violation of its jurisdiction, but leaves the prisoner to avail himself of the remedy afforded by the laws, without any interference or suggestion upon its part. As an instance of the Department's attitude it may be stated that twice in recent years, when application has been made by the British Ambassador, on behalf of Canadian authorities, for leave to take prisoners through United States jurisdiction from one part of Canada to another, the Department has stated that it was not disposed to object to such transit, but that it reserved entire freedom of action in the event of an appeal being made to it on behalf of the prisoners, and that, moreover, its failure to object was not to be regarded as a precedent.

The Department's conclusion upon the question propounded is, therefore, that although the United States reserves at any time a right to object to the transit of fugitives in course of transportation between third States, this is a right which is in practice left to be invoked by the party in appropriate judicial proceedings, and not by this government in the first instance.

Memorandum of the Department of State to the Japanese Embassy, Mar. 2, 1907, MS. Department of State, file 4904.

The Cuban Chargé d'Affaires ad interim wrote to the Acting Secretary of State on September 3, 1907, stating that Oscar Mena y Alberny, charged with killing Tomas Santa María at Habana, was being extradited from Peru. The Cuban officers having the prisoner in charge were proceeding to Habana by way of New York. The

Chargé requested the Secretary of State to grant the extradition, in the way of transit, of the accused. Following a conference with the Solicitor for the Department of State, the Cuban Chargé d'Affaires ad interim subsequently wrote to the Secretary of State, stating:

I deem it more correct and prudent—concurring in the opinion of the Solicitor of the Department of State—to make, as I hereby do, a request for the extradition, in the usual form, of the accused, Octavio Mena y Alberny. . . .

The Acting Secretary of State replied:

Pursuant to the requirements of Article XV of the extradition treaty in force between the United States and Cuba, the Legation should designate and empower an agent to act on behalf of the Cuban Government to make complaint before an extradition magistrate at the City of New York, so that the proper warrant may issue. You may not, however, deem it necessary to have formal proceedings instituted when the prisoner reaches New York City, as the necessity therefor may not arise, unless he should himself cause habeas corpus proceedings to be brought to secure his release.

The Cuban Chargé d'Affaires (Padr6) to the Acting Secretary of State (Adee), Sept. 3, 1907, MIS. Department of State, file 8323/-2; Señor Padr6 to Mr. Adee, Sept. 9, 1907, and Mr. Adee to Señor Padr6, Sept. 11, 1907, *ibid.* /3.

In connection with the proposed extradition from Luxembourg to the United States of a fugitive from Illinois, the American Minister at The Hague inquired of the Secretary of State whether permission had been obtained for the transit of Belgium "in accordance fourth article of the Belgian Law of 1874". The Department of State informed him that such permission had not been obtained and that he should cooperate with the Legation at Brussels to secure permission. Later the Minister informed the Department of the receipt of a telegram from the Minister to Belgium, stating:

Lacking treaty provisions Belgian authorities require full extradition formalities and certified documents for prisoner in transit. Refuse to recognize foreign custodian. They suggest prisoner's return through German territory.

The American Ambassador in Berlin was then instructed to endeavor to arrange for transit through Germany, and he replied:

Formalities for transit through Germany same as extradition from Germany. Agent can not accompany fugitive through Germany or on board German vessel. See despatch number 795 of July 3, 1889, for full discussion of the question.

When an effort was made to ascertain whether the fugitive might be taken to a French port, the American Ambassador in Paris informed the Secretary of State:

In the absence of a convention French Government requires same formalities for transit as for extradition proper, application for transit should be made through the Embassy and supported by copy judgment of condemnation, when granted, fugitive to be turned over by Luxemburg authorities at French frontier, to French Agents who will deliver fugitive to United States Agents at Port agreed upon.

The Governor of Illinois (Deneen) to the Secretary of State (Knox), Mar. 28, 1910, MS. Department of State, file 23700/5; the Minister at The Hague (Beaupré) to Mr. Knox, telegram of Apr. 11, 1910, and the Third Assistant Secretary of State (Hale) to Mr. Beaupré, telegram of Apr. 12, 1910, *ibid.* /14; Mr. Beaupré to Mr. Knox, telegram of Apr. 16, 1910, *ibid.* /16; the Ambassador to Germany (Hill) to Mr. Knox, telegram of Apr. 22, 1910, *ibid.* /17; the Ambassador to France (Bacon) to Mr. Knox, telegram of May 17, 1910, *ibid.* /24.

In time
of war

In 1916 the Austro-Hungarian Embassy inquired in connection with contemplated extradition proceedings against Anton Pavlik, then under indictment for murder in Bohemia, whether, in as much as the accused was of military age, the Allied Powers would, in the event extradition should be granted, give assurances that the accused would not be taken from the ship on which he might be sent back to Austria-Hungary. The British Ambassador informed the Secretary of State as follows:

I am in receipt of a despatch from Mr. Secretary Balfour stating that, as there is no guarantee that he will not be released after his trial, His Majesty's Government see no reason why they should pledge themselves to allow him to proceed freely to Austria. Unless, therefore, the United States Government are anxious for their own reasons to facilitate Pavlik's extradition, His Majesty's Government do not see their way to give any assurances that he will not be arrested on his journey.

The Austro-Hungarian Chargé d'Affaires (Zwiedinek) to the Secretary of State (Lansing), Nov. 15, 1916, MS. Department of State, file 211.63P28; Ambassador Spring Rice to Mr. Lansing, Feb. 16, 1917, *ibid.* 211.63P28/2.

The Government of Germany sought the extradition of Wadislaus Kubici and, when it appeared that surrender would be granted, inquired whether the Department of State would obtain assurances that the accused, while in transit to Germany, would not be interfered with by the governments then at war with Germany. The Office of the Solicitor for the Department of State was of the opinion that—

. . . The Department, while bound to take all proper steps to further the administration of justice, is under no treaty obligation to endeavor to facilitate the transportation of the accused. This

Government's obligation ceases with the surrender of the accused. A request by the Department for assurances that the accused would not be interfered with would probably not be granted by the Allied Governments.

Memorandum of the Office of the Solicitor, Jan. 15, 1917, MS. Department of State, file 211.62K95/3.

The French Ambassador informed the Secretary of State in 1923 that his Government was extraditing an alleged fugitive from Chile and requested the Secretary to "issue a permit, by virtue of the Convention of January 6, 1909, for the accused to go in transit over the American zone of the Panama Canal". The Secretary informed the Ambassador that—

there appears to be no authority of law under which I could take the action requested. The treaties between the United States and France do not deal with the question of transit of fugitives from justice and there is no statutory enactment in the United States bearing upon this matter. In the absence of such authority of law, the Executive branch of the Government of the United States is believed to lack the right to issue a permit for transit through its territory, or to attempt to prevent the courts from releasing the prisoner by Writ of Habeas *[sic]* Corpus, in the event that a case for such a writ were presented. However, while recognizing that the United States may at any time object to the transit through its territories of fugitives in the course of transportation between third states, it has been the attitude of this Department that the question is one which in practice should be left to be raised by the interested person in appropriate judicial proceedings, and not by this Government in the first instance.

Ambassador Jusserand to Secretary Hughes, Dec. 21, 1923, and Mr. Hughes to Mr. Jusserand, Jan. 5, 1924, MS. Department of State, file 225.51J34/—.

PROSECUTION IN LIEU OF SURRENDER

§344

Although the convention of 1868 between the United States and Italy (1 Treaties, etc. [Malloy, 1910] 966; 15 Stat. 629) does not reserve to the two Governments the right to refuse to surrender their nationals who are fugitives from the justice of the other country, Italy has consistently refused to surrender its nationals to the United States. It does, however, under its law prosecute in Italy Italian subjects found there who are charged with the commission of crime abroad. In such cases the State in which the crime was committed, or the Federal Government, if a Federal offense is involved, furnishes all available evidence of the Italian authorities. Generally this evidence is in the

form of affidavits; occasionally, however, additional evidence is sought by means of letters rogatory, as was done in the case of Donato di Majo. In that instance the Chargé d'Affaires ad interim of Italy in Washington addressed a note to the Department of State enclosing letters rogatory from the Tribunal of Santamaria Capua Vetere (Caserta) to the Circuit Court of Cook County, Illinois. The letters rogatory were forwarded to the Governor of Illinois "for such action as may be possible under the laws of Illinois". The Governor replied that he had forwarded the letters to the State's Attorney of Cook County.

The Italian Chargé d'Affaires (Montagna) to the Secretary of State (Root), Nov. 11, 1906, and Mr. Root to the Governor of Illinois (Deneen), Nov. 15, 1906, MS. Department of State, file 2254/-1; Mr. Deneen to Mr. Root, Nov. 19, 1906, *ibid.* /2.

In transmitting to the American Ambassador at Rome the original papers furnished by the Governor of Massachusetts seeking the arrest of Nicola Leoni, charged with murder in Massachusetts, with a view to his trial by the Italian courts, the Acting Secretary of State instructed the Ambassador:

You will present the papers to the Foreign Office.

If you will notify the Department when Leoni is arrested, the Governor of Massachusetts will be advised, in order that the evidence promised may be furnished.

The Ambassador replied:

I am informed that the said Leoni has been arrested and that two interrogatories connected with the case have been transmitted for execution to the Italian Consul at Boston. I am furthermore requested to use my good offices with our judicial authorities for the purpose of expediting the matter.

Acting Secretary Bacon to Ambassador White, no. 160, Jan. 18, 1907, MS. Department of State, file 3963/-6; Ambassador Griscom to Secretary Root, no. 40, Apr. 19, 1907, *ibid.* /7.

"If an Ottoman subject, who has dared to commit a crime outside of the Ottoman countries against another Ottoman subject, should return to the Ottoman countries, and it should be established that he has not been punished in the foreign country for the crime which he has committed, legal proceedings are instituted against him (in his case)." The Ambassador to Turkey (Leishman) to the Secretary of State (Root), May 23, 1908, MS. Department of State, file 13341/2-3.

When the French authorities declined to extradite Paul Emile Roy on the ground that he was a French citizen, the French Chargé d'Affaires ad interim in Washington transmitted to the Department of State letters rogatory designed to be used in the prosecution of

the accused in the French courts. Acting Secretary Adee, in writing to the Governor of New Hampshire, stated:

The letter rogatory is forwarded to you herewith, for such action as you may deem advisable under the laws of New Hampshire.

It will be noticed that the French note gives assurance that the payment of any expenses in the execution of the letter rogatory will be guaranteed by the French Minister of Justice.

The French Chargé d'Affaires (Des Portes) to the Acting Secretary of State (Bacon), Aug. 28, 1908, and the Acting Secretary of State (Adee) to the Governor of New Hampshire (Floyd), Sept. 3, 1908, MS. Department of State, file 12126/14-15.

The American Consul at Chihuahua, Mexico, in reporting to the Secretary of State in 1933 the receipt of a telegram from the district attorney at Los Angeles concerning the possible extradition from Mexico to California of Manuel Ojeda, said:

. . . In order to answer Mr. Fitt's question as to the possibility of extradition, the local Federal District Judge, who is in charge of the case, was approached informally by me and I was told that it was against the established policy of his Government to extradite nationals who are charged with having committed crimes against other Mexican citizens in the United States. He added that Ojeda had made a full confession and that he would be tried here at an early date.

Consul Mazzeo to Secretary Hull, no. 453, Nov. 29, 1933, MS. Department of State, file 212.11 Ojeda, Manuel/1.

The Secretary of State, in acknowledging the receipt of the request of the Governor of Michigan for the provisional arrest and detention of Alfonso Cortez, with a view to his extradition from Mexico, said that—

the Embassy has been directed to advise the Department promptly in the event that the apprehension of Cortez shall be brought about, and upon receipt of such information it will be immediately conveyed to you. However, it is deemed pertinent to inform you that the extradition treaty of 1899 between the United States and Mexico provides that the contracting parties shall not be obligated to surrender their own citizens in extradition proceedings and the Mexican Government has quite consistently declined to grant such surrender, but has ordinarily been willing to place its citizens upon trial in Mexico upon charges of crime committed in the United States.

Secretary Hull to Governor Murphy, Jan. 7, 1933, MS. Department of State, file 212.11 Cortez, Alfonso/2.

IRREGULAR RECOVERY OF FUGITIVE

§345

The American Consul at Winnipeg, Manitoba, inquired of the Secretary of State whether extradition had been granted in the case of Adelard Lafond, charged in Canada with larceny. He stated that the accused was then in jail at Winnipeg and that he claimed he had been kidnapped on the streets of Ottawa, Illinois. The Department informed the Consul that no warrant had been issued. The Consul then reported that, upon his request, the Acting Attorney General of Canada was willing to return Lafond to Illinois. He was instructed:

If no objection by Canadian authorities you may request return Lafond to Ottawa, Illinois, as suggested by Acting Attorney General. Render all possible assistance.

The Consul later reported:

Lafonde released today by order of Attorney General upon my request and transportation to Ottawa, Illinois, furnished, with five dollars for expenses. Attorney for prosecution says all charges against Lafonde have been dropped. Lafonde expects to leave tonight.

Consul Jones to Secretary Root, telegram of Mar. 17, 1908, and the Chief Clerk of the Department of State (Carr) to Mr. Jones, telegram of Mar. 18, 1908, MS Department of State, file 9194/19; Mr. Jones to Mr. Root, telegram of Mar. 19, 1908, *ibid.* /20; the Acting Secretary of State (Bacon) to Mr. Jones, telegram of Mar. 23, 1908, *ibid.* /21; Mr. Jones to Mr. Root, telegram of Mar. 26, 1908, *ibid.* /32.

It was alleged that Tomas Hernandez forcibly compelled Luis Lopez, who was wanted in Texas on a charge of violating the Harrison Narcotic Act, to cross the Rio Grande from Mexico to a point a short distance below Laredo, where, according to previous arrangements, the accused was arrested by Henry Keene, United States deputy marshal, and Edward Villarreal, a constable of Webb County, Texas. Hernandez, Keene, and Villarreal were then charged in Mexico with the crime of kidnapping, and their extradition was requested. There was a rather clear indication that members of the military service of Mexico actually arrested Lopez and delivered him to Hernandez. When the extradition of the three men was denied, the Mexican Embassy, in an *aide-mémoire* dated April 12, 1935, requested that Lopez be returned to Mexico, on the ground that "instead of being extradited by legal channels" he "was brought into American territory in a manner which constitutes an invasion of jurisdiction by American officials, committed in Mexican territory".

The Attorney General, to whom the matter was referred, while recognizing the irregular recovery of Lopez, pointed out that, in ac-

cordance with the decision of the Supreme Court of the United States in the case of *Ex parte Johnson*, 167 U. S. 120 (and cases cited therein), the trial of the accused and his subsequent imprisonment were valid and lawful and in the circumstances it would be necessary to apply to the President for a commutation of the sentence in order to return Lopez to Mexico.

The Mexican Embassy to the Department of State (*aide-mémoire*), Apr. 12, 1935, MS. Department of State, file 211.12 Hernandez, Tomas/152; Secretary Hull to Attorney General Cummings, May 1, 1935, *ibid.* /156; Mr. Cummings to Mr. Hull, *ibid.* /163.

It is contended by the defendant that, being in British Columbia, a British province, he could not be removed without the permission of the British Columbia authorities; that, having been abducted, he is unlawfully before the court, and this court has no jurisdiction. The offense of which the defendant is charged does not appear to be within the extradition convention between the United States and Great Britain (26 Stat. p. 1508). Article 1 enumerates the causes applicable, and a mail fraud case is not one of them. No asylum is guaranteed to defendant in Canada, and if a treaty did cover the offense charged it would be political, and not judicial, and before the matter could be presented to the court the Congress must make it a rule for the court. The treaty between the United States and Great Britain is a compact depending upon honor between the governments. Any infractions are subject to international negotiation, so far as the party chooses to seek redress. It must be obvious that with this the courts have nothing to do. *U.S. v. Rauscher*, 119 U.S. 407, at page 418, 7 Sup. Ct. 234, 30 L. Ed. 425.

The right of British Columbia to give asylum to the defendant is different from the right of the defendant to demand and insist upon security in such asylum. England or Canada, through its sovereignty, if unlawfully invaded, may demand reparation and a surrender of the abducted party and also the parties committing the offense, and in case of refusal to comply with the demand might resort to reprisals or take any other measures it deems necessary as redress for the past and security for the future. *Mahon v. Justice*, 127 U.S. 700 at 705, 8 Sup. Ct. 1204, 32 L. Ed. 283.

The defendant, even though abducted from British Columbia, was subsequently arrested in the United States on the indictment or complaint under the fugitive from justice statute, predicated upon an indictment returned in the Western district of New York. The sole question before the court is the legality of his arrest in the United States. On that I do not understand that there is any question. The proceedings before the court, had subsequent to the arrest, appear to be regular. There is no question as to the indictment or identity of the defendant. There is no power vested in this court to dispose of the matter other than as

provided by law, the determination of the identity of the defendant and probable cause, and to direct his removal.

The defendant states he is a citizen of the United States. He is now before the courts of the United States. Canada is not making any application to this court in his behalf or its behalf, because of any unlawful act charged, and if Canada or British Columbia desires to protest, the question undoubtedly is a political matter, which must be conducted through diplomatic channels. The defendant cannot before the court invoke the right of asylum in British Columbia.

So, in this case the jurisdiction of the court is fixed by acts of the Congress, and if a right of the defendant has been violated or the peace or dignity of British Columbia trespassed upon, that is not a matter for this court. The offense for which the defendant stands charged is not within the treaties between the countries, and the mere fact, if true, as stated in the petition, that the defendant was kidnapped from British Columbia, would not give this court power to examine such fact, and, if true, release the defendant. There is no power by which it can be done; that is a matter which rests between the defendant and the parties abducting him, or between the political powers of the British Columbia government and that of the United States.

United States v. Unverzagt, 299 Fed. 1015, 1016-1018 (D C, W.D. Wash., N. D., 1924).

D. C. Greenleaf, an attorney of Minot, North Dakota, informed the Attorney General on December 13, 1909:

I am directing this communication to you on behalf of one, Marker. It appears that Mr. Marker was wanted in Saskatchewan, Canada for theft and that he was living in the North end of Williams county, N.D. That some time in September Marker was arrested in the U.S. Territory by men by the name of Churchill and Riley, who were both dressed in private clothes, the said Churchill alleging "that he was a constable of the Northwest Mounted Police of Canada." That these men tied and bound Mr. Marker and carried him out of the United States into Canada.

It appears that at one time Marker had a claim in Canada, that he picked up a couple of stray horses and worked them, and that, as I understand it, is a crime under the laws of Canada.

I can get several affidavits supporting beyond question the fact that Marker was taken by force from this country to Canada and was not extradited pursuant to the provisions of the Extradition Treaty.

This is a matter which will necessitate immediate action and I desire to learn whether or not The Department of Justice would take this matter up, and if so, the nature of the proof you desire.

The letter from Greenleaf was referred to the Secretary of State, and on December 30 the Assistant Secretary of State informed Green-

leaf that, if he would forward the evidence referred to, the question of taking further action in the case would be considered.

The matter was eventually taken up with the British Ambassador in Washington, and he informed the Acting Secretary of State as follows:

I beg to enclose copy of a report on the circumstances of the case by Commissioner A. Bowen Perry of the Royal North West Mounted Police, Regina, Canada.

This report was enclosed in a letter from the Deputy Attorney-General of the Province of Saskatchewan to the Canadian Secretary of State for External Affairs.

The Deputy Attorney-General in this letter states that the Attorney-General has come to the conclusion, in view of the advice of the Minister of Justice "to enter a stay in the case against Marker and release him, giving him an opportunity to leave the country". He further points out that it required the services of a surveyor to fix the boundary line at the point in question between the United States and Canada, which circumstance, he contends, may well be considered a sufficient excuse for the action of the Police Officer in recapturing Marker at the point in question.

D. C. Greenleaf to Attorney General Wickersham, Dec. 13, 1909, and Assistant Secretary Wilson to Mr. Greenleaf, Dec. 30, 1909, MS. Department of State, file 22838; Ambassador Bryce to Acting Secretary Wilson, Aug. 17, 1910, *ibid.* 342.112M34/8.

C. M. Lawske set up as a defense in his trial in the District Court of Austin County, Texas, that he had been arrested in Mexico and returned to Texas without a proper warrant of extradition. This defense was presented in a sworn motion in which the accused averred in substance that he had been arrested by a deputy sheriff of Austin County who claimed to have a warrant and proper extradition papers for the purpose of arresting him. He alleged that "he verily believes that said Ed. Burus did not have the legal and necessary extradition papers, warrants, and authority to arrest and forcibly bring defendant from Mexico into Austin county, Tex., on the charge therein preferred, or on any charge whatsoever". Proof on the motion was not adduced, nor were the facts stated authenticated in any manner or form. The Court of Criminal Appeals of Texas, in an opinion dated October 13, 1909, held that the averment was a mere conclusion and, in the absence of proof, could not have the effect of arresting the proceedings and entitling the accused to a discharge.

Lawske v. State, 57 Tex. Cr. R. 32, 121 S.W. 865, 867 (1909).

Morton Campbell petitioned for a writ of *habeas corpus*, alleging that he was illegally confined and restrained of his liberty at Laredo, Texas. The United States attorney at Houston demurred to the petition. Campbell sought his discharge on the ground that he was a

citizen of Mexico and that while residing there he was forcibly seized, or kidnaped, and brought into Texas where he was taken into custody by the United States marshal under a previously imposed sentence. Originally the petitioner alleged he had been deported by Mexico as a result of an affidavit by an immigration officer of the United States that the petitioner was an American citizen. The petition was amended by permission of the court so that thereafter it was made to appear that the petitioner was kidnapped by officers of the United States and Mexico, acting and conspiring together, and forcibly brought into the United States. The court said :

We think that the demurrer is well taken, and should be sustained, and the petition dismissed. *Ker v. Illinois*, 119 U.S. 436, 438, 7 S. Ct. 225, 30 L. Ed. 421, 423 (see, also [C.C.] 18 F. 167, 169); *Pettibone v. Nichols*, 203 U.S. 192, 217, 27 S. Ct. 111, 51 L. Ed. 148, 159, 7 Ann. Cas. 1047; *Cook v. Hart*, 146 U.S. 183, 191, 13 S. Ct. 40, 36 L. Ed. 984, 938; *Ex parte Charles Johnson*, 167 U.S. 120, 17 S. Ct. 735, 42 L. Ed. 103; *Mahon v. Justice*, 127 U.S. 700, 8 S. Ct. 1204, 32 L. Ed. 283, 287. The cases from other jurisdictions are practically all in harmony with those cited.

An order will enter, sustaining the demurrer, dismissing the petition, and remanding petitioner to the custody of the marshal.

Following the receipt of a note from the Mexican Embassy the matter was investigated, and the American Ambassador was informed by the Department that the Mexican Embassy was satisfied that Campbell was not kidnaped and that this aspect of the case might be considered as closed.

Ex parte Campbell, 1 F. Supp. 899 (D.C., S.D. Tex., 1932); the Mexican Chargé d'Affaires (Ortiz) to the Secretary of State (Stimson), Feb. 2, 1933, MS. Department of State, file 311.1221 Campbell, Morton/1; the Acting Secretary of State (Carr) to the Ambassador in Mexico (Daniels), July 5, 1933, *ibid.* /28.

EXPENSE

§346

The extradition treaties provide in general for the payment by the requesting government of the expenses involved in extradition proceedings. The provisions are not uniform. The treaty of 1931 between the United States and Great Britain (4 Treaties, etc. [Trenwith, 1938] 4274, 4277; 47 Stat. 2122) provides in article 13:

All expenses connected with the extradition shall be borne by the High Contracting Party making the application.

A more detailed provision is contained in article XI of the treaty of 1930 between the United States and Germany. 4 *Treaties, etc.* (Trenwith, 1938) 4216, 4220; 47 Stat. 1862, 1870. It reads:

The expense of transportation of the fugitive shall be borne by the government which has preferred the demand for extradition. The appropriate legal officers of the country where the proceedings of extradition are had, shall assist the officers of the Government demanding the extradition before the respective judges and magistrates, by every legal means within their power; and no claim other than for the board and lodging of a fugitive prior to his surrender, arising out of the arrest, detention, examination and surrender of fugitives under this treaty shall be made against the government demanding the extradition; provided, however, that any officer or officers of the surrendering government giving assistance, who shall, in the usual course of their duty, receive no salary or compensation other than specific fees for services performed, shall be entitled to receive from the government demanding the extradition the customary fees for the acts or services performed by them, in the same manner and to the same amount as though such acts or services had been performed in ordinary criminal proceedings under the laws of the country of which they are officers.

In view of the lack of uniformity in these provisions, it is necessary in each instance to consult the applicable treaty in order to determine what expenses may be charged against the demanding government.

In those cases where the fees of commissioners, marshals, and other officers are proper items of expense, the amount thereof is that fixed by statute. See title 28 of the United States Code, §§ 543-607. The procedure to be observed in obtaining from foreign governments expenses properly chargeable to them is prescribed in title 18 of the United States Code, §668, which reads:

All witness fees and costs of every nature in cases of extradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing shall take place to the Secretary of State of the United States, and the same shall be paid out of the appropriations to defray the expenses of the judiciary. The Attorney General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall cause said amounts to be collected and transmitted to the Attorney General for deposit in the Treasury of the United States.

Accounts of authorities of asylum states for expenses incurred in extradition cases should be presented to the Government of the United States only after the conclusion of the case. The Secretary of State (Kellogg) to the American Consul at Salina Cruz, telegram of Sept. 30, 1926, MS. Department of State, file 212.11J17/20.

The Department of State sent the following communication to the Governor of Illinois:

... Appropriation at Department's disposal is limited to cases of violations of Federal law. It can not, therefore, pay expenses in extraditions for offences against State laws. Understand Attorney General of Illinois has decided that State of Illinois is not responsible for expenses in cases of international extradition. Department would be glad to have general assurances from you on this subject in order to obviate necessity of similar telegrams in future cases.

The Acting Governor responded:

Replying to your telegram of the twenty-fourth instant on behalf of the state of Illinois I guarantee payment of all expenses in the apprehension, arrest, conveying and return of Fred L. Sieben from Welland in the province of Ontario to Cambridge, Ills.

The Governor of Illinois (Deneen) to the Secretary of State (Root), Oct. 23, 1906, and Mr. Root to Mr. Deneen, Oct. 24, 1906, MS. Department of State, file 1778; the Acting Governor of Illinois (Sherman) to Mr. Root, Oct. 27, 1906, and Mr. Root to the Consul at Fort Erie, Oct. 29, 1906, *ibid.* 1778/3.

Where the application has originated with the Governor of a State for violation of State laws, the expenses are borne by the State at whose instance the surrender of the fugitive is asked. It is therefore suggested that you present your account for expenses to the proper authorities of your State.

Acting Secretary Bacon to Enrique B. Guerra, Dec. 20, 1907, MS. Department of State, file 7607/26.

The Acting Attorney General gives the following items that usually occur in extradition cases from which you may form an idea as to cost:

Travel to serve warrant of arrest and subpoena for witnesses, 6 cents for each mile necessarily traveled;

Expenses endeavoring to arrest the defendant, not exceeding \$2.00 for each day's endeavor;

For service of warrant of arrest, \$2.00;

Transporting deputy, necessary guard, and defendant, 10 cents for each mile for each person;

Deputy marshal's attendance before the commissioner at the examination of defendant, \$2.00 for each day;

Committing, discharging, or bonding defendant, 50 cents for each;

Witness fees, \$1.50 for each day's attendance before the commissioner for each witness;

Mileage to witnesses, 5 cents for each mile traveled from the place of residence to the place of trial or hearing, and 5 cents for each mile returning;

Actual cost of prisoner's subsistence and medical attention.

In addition to the usual items above mentioned that occur in the accounts of United States marshals, there are fees for the services of United States commissioners, for issuing the process, conducting the examination, etc., and at times there are other costs that arise which are not herein mentioned as usual, but which occur on account of the peculiar circumstances surrounding the particular case.

The Acting Secretary of State (Wilson) to the Chargé d'Affaires of the Netherlands (Van Weede), July 9, 1910, MS. Department of State, file 24850/1.

I have the honor to state in reply to your letter of the 4th instant, relative to fees and costs certified to you under date of January 5, 1907, in the matter of the application for the extradition of J. Doyle, a fugitive from Great Britain, that the \$48.00 charged by the Commissioner for certified copy of record for the Secretary of State, is not a legal charge under the act of May 28, 1896, as construed by the Comptroller of the Treasury and shown on page 693 of volume 14 of his decisions, and should, therefore, not be charged to or collected from the foreign government.

Copy of
record

The Assistant Attorney General (Harr) to the Secretary of State (Knox), Mar. 9, 1912, MS. Department of State, file 211.41D77/5.

. . . the practice of this Department [Justice] has for many years been to charge to and your Department [State] to collect from the various foreign countries with whom the United States has extradition treaties, except where the treaty expressly prohibits, such fees and expenses as have been and are now taxed to and collected from private litigants in the United States courts, following the law as stated in section six of the Act of May 28, 1896 (29 Stat. L. 179).

As to that portion of your letter which refers to the matter of collecting the amount of salary allowed by the officer for the time spent on any particular case, I have the honor to state that it would be impracticable to arrive at definite conclusions as to the amount to be charged on account of the varied portions of time spent by one or more persons on any one case.

The Department believes that the present practice is not prohibited by the treaties, except a few, and that the practice should be continued until the treaties expressly provide otherwise.

The Assistant Attorney General (Knaebel) to the Secretary of State (Bryan), June 2, 1914, MS. Department of State, file 211.42A15/11.

A post-office inspector who had proceeded to Mexico to effect the return of a fugitive incurred certain expenses. He presented to the United States marshal his claim for reimbursement, who presented the matter to the Attorney General and was informed that these expenses were properly payable from the appropriation under the control of the Department of State for "Bringing Home From Foreign Countries Persons Charged With Crime". The Under Secretary of State, however, informed the Postmaster General that—

Unauthorized
expense

the expenditures incurred in this connection are not properly chargeable to any appropriation under control of this Department.

It appears from the correspondence that the expenses were incurred through an arrangement by an employee of your Department and not within the jurisdiction of the Department of State, where all cases concerning the extradition of fugitives from justice of the United States from foreign countries are placed by law.

The Postmaster General (New) to the Secretary of State (Hughes), Feb. 21, 1925, and the Under Secretary of State (Grew) to Mr. New, Mar. 5, 1925, MS. Department of State, file 212.11P83/-.

TRIAL OF ACCUSED

§347

The treaties of extradition usually contain provisions limiting prosecution in the demanding state, except as to crimes or offenses committed after extradition, to those crimes or offenses for which the accused was surrendered. Article IV of the treaty of 1923 between the United States and Latvia (4 Treaties, etc. [Trenwith, 1938] 4394, 4396; 43 Stat. 1738, 1740) is typical of one form of provisions used. It reads: "No person shall be tried for any crime or offense other than that for which he was surrendered."

Another form is that found in article 7 of the treaty of 1931 between the United States and Great Britain (4 Treaties, etc. [Trenwith, 1938] 4274, 4276; 47 Stat. 2122, 2124), reading:

A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he was surrendered.

This stipulation does not apply to crimes or offences committed after the extradition.

Even in the absence of an express provision therefor in the applicable treaty or convention it has been held that the limitation as to trial after surrender is within the "manifest scope and object of the treaty". In *Johnson v. Browne*, the court said:

It does not appear that any movement has been made or notice given by this Government to try the respondent on the indictment for the crime for which he has been extradited, but his imprisonment in Sing Sing Prison is upon a conviction of a crime for which the Canadian court had refused to extradite him, and is entirely different from the one for which he was extradited. In other words, he has been extradited for one offense

and is now imprisoned for another, which the Canadian court held was not, within the treaty, an extraditable offense.

Although the surrender has been made, it is still our duty to determine the legality of the succeeding imprisonment, which depends upon the treaty between this Government and Great Britain, known as the Ashburton treaty of 1842, 8 Stat. 572-576, Art. 10, and the subsequent one, called a convention, concluded in 1889, and above referred to.

The treaty of 1842 had no express limitation of the right of the demanding country to try a person only for the crime for which he was extradited, and yet this court held that there was such a limitation, and that it was to be found in the "manifest scope and object of the treaty itself;" that there is "no reason to doubt that the fair purpose of the treaty is, that the person shall be delivered up to be tried for that offense and for no other." *United States v. Rauscher*, 119 U.S. 407, 422, 423.

Again, at the time of the decision of the *Rauscher* case there were in existence sections 5272 and 5275, Rev. Stat. (3 Comp. Stat. p. 3595), both of which are cited and commented upon in that case.

Mr. Justice Gray, page 433, in his concurring opinion, places that concurrence upon the single ground that these sections clearly manifest the will of the political department of the Government in the form of an express law that the person should be tried only for the crime charged in the warrant of extradition, and he should be allowed a reasonable time to depart out of the United States before he could be arrested or detained for any other offense. Both grounds were concurred in by a majority of the whole court.

If the question now before us had arisen under the treaty of 1842 and the sections of the Revised Statutes above mentioned, we think the proper construction of the treaty and the sections would have applied to the facts of this case and rendered the imprisonment of the respondent illegal. The manifest scope and object of the treaty itself, even without those sections of the Revised Statutes, would limit the imprisonment as well as the trial to the crime for which extradition had been demanded and granted.

205 U.S. 309, 316-318 (1907).

The demanding state may try an alleged fugitive from its justice on any crime covered by the request, so long as the asylum country does not refuse extradition on that offense. *People ex rel. Stilwell v. Hanley, Warden*, 124 Misc. 180, 207 N.Y. Supp. 176, 177 (Sup. Ct., N.Y. Cy., spec. term, 1924).

... When a treaty or statute contains a provision that the party surrendered shall be tried for no other offense until he has had an opportunity to leave the country, the meaning of such a provision is perfectly plain, and must receive a reasonable and sensible construction. The party proceeded against must not be tried for any other offense existing at the time when he was extradited (whether at the time of such extradition it had or had not been discovered), until he shall have had a reason-

able time to return to the country from which he was taken, after his trial or other termination of the proceeding. That such privilege should be accorded to one who commits a crime after his surrender to a demanding government lacks all semblance of reason or sense.

Collins v. O'Neil, Sheriff, 214 U.S. 113, 123 (1909).

Following its decision in the case of *Collins v. O'Neil*, the Supreme Court held in 1915 that a person extradited from Canada is not protected by treaty or by statute from trial and conviction for a crime committed in the United States subsequent to the extradition.

Collins v. Johnston, Warden of the California State Prison, 237 U.S. 502, 511 (1915).

It was indicated by the United States Circuit Court of Appeals that the recovery of a fugitive from justice as an act of comity on the part of a country with which a treaty of extradition is not in force does not afford a defense for the accused in his trial in the demanding state. The court said:

. . . If there had been no treaty between this country and Great Britain, Canada, if it chose to do so, could have surrendered them for trial in this country, and they could not have questioned, on their trial, the legality of their surrender.

Greene et al. v. United States, 154 Fed. 401, 407 (C.C.A. 5th, 1907).

New indictment on same charge

. . . A careful review of the authorities, as we understand them, will show that where a party has been extradited, and the indictment or complaint forms the basis of an extraditable offense, under the treaty between the demanding and the asylum countries, the fact that the complaint or indictment is quashed in the demanding state will not authorize the extradited party to demand his return to his asylum in a foreign country, if the demanding state desires to hold him over for trial when the papers are quashed.

The cases practically seem to concede that the offense must be the same for which he was extradited, and that he cannot be held for a different offense; but none of the cases which have come under our observation lay down the proposition that because of the want of sufficient technical allegations in the charge, whether complaint or indictment, that fact would debar the demanding state from holding over the extradited party to answer a valid prosecution. In the case of *In re Foss*, 36 Pac. 669, 102 Cal. 347, 25 L.R.A. 593, 41 Am. St. Rep. 182, it was held that the discharge of a person who has been surrendered by a foreign nation under extradition proceedings, on setting aside the indictment against him, does not prevent his arrest on a subsequent complaint for the same offense.

Ex parte Fischl, 51 Tex. Cr. R. 63, 100 S.W. 773 (C.C.A., Tex., 1907).

The German Ambassador in Washington in a note to the Secretary of State in 1907 referred to the fact that in July 1905 the Government of the United States had surrendered in extradition Georg Bartholomaeus, on a charge of forgery. The accused was convicted in Germany and was sentenced to a term of imprisonment. Another criminal action was pending against him, but the offense was not extraditable under the treaty and extradition on it had not been requested. The German Government, the Ambassador explained, understood that in extradition cases occurring between the United States and Germany the person extradited could be prosecuted only for the offenses on which he was surrendered. However, as there was no provision in the then-existing treaty as to whether, and if so when, a person extradited to Germany from the United States might be prosecuted and punished for an offense committed prior to extradition but not covered by the formal request for or warrant of surrender, the German Government was of the opinion that the immunity was not absolute for all time.

The Secretary of State replied:

... where our treaties of extradition with foreign countries contain no express limitation on the right of the demanding country to try a person only for the crime for which he was extradited, it is the practice of this Department to imply such a limitation on the ground that such is within the manifest scope and object of these treaties, notwithstanding there is no express stipulation to this effect. So far as extradition from this country is concerned, this attitude is required by reason of the ruling of the Supreme Court of the United States to the effect that the Revised Statutes of the United States relating to extradition clearly manifest the intention that the fugitive shall be tried for that offense only with which he is charged in the extradition proceedings, and for which he was delivered up; and that if not tried for that crime he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime which he committed before his extradition. The same reasonable time would also have to be allowed after an acquittal of the crime charged in the extradition proceedings, or, as it would appear, after the expiration of the term of confinement following a conviction for such a crime, before an arrest could be made for the commission of a crime not charged in the extradition proceedings and committed prior thereto.

The Department is therefore in accord with the Embassy upon the general principle that trial and acquittal of or trial and conviction for an extradition offense does not clothe the fugitive with permanent immunity from prosecution for other offenses committed prior to extradition, but that the fugitive may be re-arrested after he has been given a reasonable time to depart from the jurisdiction.

Such being the principle in the United States, this Department sees no reason to object to its application in Germany.

Since in the United States the question "What is a reasonable time?" is one for the determination of the courts, and not for the Executive, it is impossible for the Department, in the absence of a treaty, to specify thirty days as the proper period. It is true that some of the recent extradition treaties between the United States and foreign countries fix the time at thirty days, but others merely provide for the lapse of a "reasonable time" before the re-arrest can be secured. The question would be determined with reference to the facts of each particular case, and a duration of time which might be entirely reasonable in one case might not be reasonable in another.

The German Ambassador (Von Sternburg) to the Secretary of State (Root), Dec. 7, 1907, and Mr. Root to Ambassador von Sternburg, Dec. 28, 1907, MS. Department of State, file 10334.

The district attorney for Cayuga County, New York, informed the Department of State that Herman Bartels, Sr., who had been extradited from Canada on a charge of perjury, was awaiting trial; that Bartels had previously been convicted of attempted arson but had escaped to Canada before sentence had been imposed; that, as the treaty of extradition in force between the United States and Great Britain did not provide for extradition in cases of attempted arson, the indictment for perjury had been obtained upon evidence given by the accused at his trial on the arson charge; and that, while he expected to try Bartels on the perjury charge, he desired to know whether, in the event that he did not obtain a conviction on the perjury charge, it would be necessary to give the accused a reasonable time to return to Canada before rearresting him on the charge of attempted arson. The Assistant Secretary of State informed the district attorney as follows:

In reply I have to say that Article III of the extradition treaty of 1889 between the United States and Great Britain provides that "no person surrendered by or to either of the high contracting parties shall be triable for any crime or offense committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered."

The Supreme Court of the United States has recently held that this is applicable to convicted persons as well as to persons charged with crime. *Johnson vs. Brown*, 205 U.S. 309.

It will be seen, therefore, that if the fugitive is acquitted upon the charge of perjury for which he has been extradited, he must be given an opportunity to return to Canada before he can be legally re-arrested on another charge.

What may be considered a reasonable time after release before he can be lawfully re-arrested would seem to be governed by the

particular circumstances of the case and is a question for judicial determination. It may be stated, however, that in many of our treaties of extradition it is stipulated that a period of thirty days must elapse before the fugitive is again arrested.

District Attorney Burritt to Assistant Secretary Bacon, Dec. 9, 1907, and Mr. Bacon to Mr. Burritt, Dec. 16, 1907, MS. Department of State, file 7015/7.

. . . It is submitted that the evidence in this case is not sufficient to sustain the charge of murder, for which the extradition is demanded. The treaty, however, also includes manslaughter as an extraditable offense, and under the laws of the United States a person who is indicted for murder may upon trial be convicted of any degree of homicide, and even of a simple assault. This being so, it is probable that, in keeping with the policy of the Department to expedite the extradition of criminals, and . . . in recommending the issuance of a warrant, this Office should err rather on the side of surrendering the fugitive than on the side of defeating surrender, the warrant should be issued in this case, leaving the defendant to pursue such legal remedies in the courts as may be available to him.

Memorandum of the Office of the Solicitor for the Department of State, Jan. 5, 1914, MS. Department of State, file 211 42B58/-.

The United States Circuit Court of Appeals stated in *United States ex rel. Klein v. Mulligan* that a person who is proved guilty of obtaining property by theft or fraud cannot be convicted as a receiver of the property so obtained.

50 F. (2d) 687, 689 (C C A. 2d, 1931).

Benjamin D. Greene and John F. Gaynor were surrendered in extradition proceedings by the Canadian Government on charges of participation in fraud by an agent and trustee, participation in embezzlement, and receiving money and property, knowing the same to have been fraudulently obtained. Following their return to the United States, the accused contended that the court was without jurisdiction; that none of the crimes was charged in the indictment; and that the court could try them only on the charges for which extradition was granted. They insisted that, notwithstanding that the essential facts constituting an offense criminal in both countries were fully recited in the indictment and as fully placed before the commissioner of extradition, as appeared from his judgment, the court was without jurisdiction because in some of the counts the aggregated facts thus denounced by law were, by the prosecuting authorities, termed a conspiracy. The court overruled the contentions, stating:

In view of the grave consequences of the offenses charged, this proposition is startling to all who consider the right of the people

CHAPTER XII—EXTRADITION

to have issues like this tried upon the merits and the guilt or innocence of the parties determined by the evidence.

The whole contention of the accused may be summarized in a single sentence. The indictment charges conspiracy, and the prisoners were returned to the bar of this court for something else. It is further charged that the prisoners are put on trial for crimes other than those for which the extradition was granted. As we have previously seen, generic terms were utilized by the great diplomatists and lawyers who drafted this treaty wherever it was deemed that specific language was not adequate. The purpose was to accomplish extradition and the trial on the merits which should follow. Fraud by an agent or trustee, and participation in extraditable crimes are illustrations of this character. . . . An indictment is to be construed, not by the name with which it is christened, but by the crime which it actually truly and fully sets forth in the averments of fact. If, then, it should appear that the pleader in this case termed as a conspiracy, a gigantic scheme to defraud the United States of hundreds of thousands of dollars, a scheme which in its substance and essence is made penal by the statute, which is made penal also by the criminal laws of Canada, if the averments are full, circumstantial, complete, putting the prisoner on notice of all the proof which the government intends to offer against him; if, in other words, it is an adequate description of joint participation in a gigantic fraud accomplished by a trusted agent of the government of the United States, how is anybody hurt because along with all this fullness of averment, this completeness of notice and information of the character of the offense charged, the pleader also terms it a conspiracy?

Our conclusion, then, is that the extradition was amply authorized by the treaty; that the prisoners were extradited for alleged crimes indictable in both countries; that the language of the present indictment is, in all substantial respects, adequate to secure their constitutional rights to full information of all the charges against them, and to accord them a fair and righteous trial so far as the indictment goes.

United States v. Greene, et al, 148 Fed. 766, 771-776 (D C, S D. Ga., 1906).

When counsel for George E. Buck, who had been extradited to Canada, complained to the American Consul at Calgary, Canada, that the accused had been convicted of an offense other than the one for which he was extradited, the Consul requested the Secretary of State to authorize the employment of an attorney "to hold a watching brief for the Department of State" when the case was argued before the Supreme Court of Canada at Ottawa. The Secretary of State informed the Consul:

It would not be in accordance with Department's practice to be represented by counsel at hearing of appeal in Buck case. Ques-

tion of diplomatic intervention could apparently be decided upon inspection of court records.

Consul Clum to Secretary Lansing, telegram of Feb. 4, 1917, and Mr. Lansing to Mr. Clum, telegram of Feb. 5, 1917, MS. Department of State, file 211.42B85/20.

While the provision in article IX of the treaty between the United States and Switzerland (2 Treaties, etc. [Malloy, 1910] 1771, 1774; 31 Stat. 1928, 1932) requires the consent of the accused before the demanding state may prosecute for an offense other than that for which extradition was granted, the convention concluded in 1882 between the United States and Belgium (1 Treaties, etc. [Malloy, 1910] 100, 101; 22 Stat. 972, 974), as well as several others, requires the consent of the government of the asylum state before such prosecution may be had. Consent

In 1906 the British Ambassador in Washington protested against the conviction and committal to the penitentiary of Arthur F. McIntire for a crime other than that for which he had been extradited. The Attorney General reported to the Department of State that, while it was true that McIntire had been convicted of a crime other than the one for which he had been extradited and that the crime of which he had been convicted was not an extraditable crime, he had been informed of his rights under the treaty and had been offered his liberty; the accused had stated that he was tired of being a fugitive and wished to serve the sentence imposed upon him by the United States court. The British Government was informed of these facts and took no further action in the matter.

Ambassador Durand to Acting Secretary Adee, no. 173, Sept. 11, 1906, and Acting Attorney General Robb to Secretary Root, Sept. 20, 1906, MS. Department of State, file 964/1, /3.

CIVIL SUITS

§348

The memorandum of the Department of State relating to applications for the extradition from foreign countries of fugitives from justice states that each application should contain a statement to the effect that it is made solely for the purpose of bringing about the trial and punishment of the fugitive and not for any private purpose and that, if the application is granted, the criminal proceedings will not be used for any private purpose.

Department of State, *Memorandum*, Sept. 1921.

Henry O'Brien, whose extradition was requested by the British Embassy on behalf of the Government of Canada, sought to defeat extradition by alleging that an extraditable offense had not been charged but that surrender was desired in order to force payment of a judgment obtained in a civil action. In holding the accused for the action of the Secretary of State, the Commissioner stated:

I do not think it makes any difference in this criminal proceeding whether a civil proceeding had been instituted prior to the criminal proceeding or not. The fact that the civil proceeding had been instituted would not bar a criminal proceeding if there was evidence that a crime had been committed.

Record of Proceedings, p. 62, MS. Department of State, file 211.420'B6/1.

J. Budd Smith, a temporary resident of the Republic of Panama, went into the Canal Zone on April 9, 1917, to give testimony in the United States court there in a civil case. While he was in the Canal Zone a summons, a complaint, and a restraining order, or temporary injunction, arising out of the same case were served on him, notwithstanding that he appeared specially as a possible witness. The injunction was made permanent, after a hearing on a later date when Smith was not present in court. Just prior to the date on which it was made permanent, Smith violated the terms of the preliminary injunction. He was thereupon cited for criminal contempt, and a bench warrant was issued for his arrest. On application made to the authorities of Panama a court of that country ordered his extradition on the contempt charge. He was returned to the Canal Zone and placed in jail. While so confined he was, for the first time, served with a citation to show cause why attachment should not issue for a civil contempt. The United States District Court for the Canal Zone adjudged Smith guilty of civil contempt of the court and entered an order against him. He appealed to the Circuit Court of Appeals for the Fifth Circuit, which stated:

The judgment rendered in the contempt proceedings is not sustainable, even if the appellant was subject to be punished for disobeying an order which was never made effective by a valid service of process. The only service upon him of the order commanding him to appear and show cause why he should not be attached for contempt was made while he was in jail, held as an extradited prisoner. It seems that this was not permissible because of the court's lack of right to exercise jurisdiction of the appellant for any purpose other than the one for which he was delivered by the Panama authorities, unless the exercise of jurisdiction is based upon something happening after the extradition. *United States v. Rauscher*, 119 U.S. 407, 422, 7 Sup. Ct. 234, 30 L. Ed. 425; *In re Reinitz (C.C.)* 39 Fed. 204, 4 L.R.A. 236; *In re Baruch (C.C.)* 41 Fed. 472; *Collins v. Johnston*, 237

CIVIL SUITS

U.S. 502, 35 Sup. Ct. 649, 59 L. Ed. 1071; U.S.R.S. §5275 (Comp. St. 1916, §10121).

However this may be, certainly a court should not allow itself to be made the instrument of perverting the process of extradition to serve the purposes of a private litigant who was instrumental in having that process resorted to with the object of having the extradited person subjected to a civil liability, instead of being tried for the crime with which he was charged. It is fairly to be inferred from circumstances disclosed that, if the procuring of the extradition was accompanied by a purpose to try the appellant on the criminal charge on which he was extradited, that purpose was a very secondary one and was subordinated to the controlling one of getting the appellant into the Canal Zone, so that civil process for an alleged contempt of court might be served upon him and a hearing on that charge had. It was not until after it had become apparent that service could not be made of the court's order to show cause that one of the appellees, at whose instance that order was procured, made the affidavit which was the beginning of the criminal proceeding against the appellant. That criminal charge was made the means of effecting the appellant's extradition. When, as a result of the extradition, the opportunity was afforded of trying the appellant on that charge, the public official whose duty it was to prosecute it, instead of manifesting a desire to avail himself of that opportunity, actively co-operated with the counsel for the appellees in the effort to have the court give precedence to a civil case brought against the appellant before the criminal proceeding was instituted—service of process in the civil case having been made while appellant was held in custody to answer the criminal charge—and volunteered the suggestion to the court that the criminal case must wait upon the court's action in the civil one. To say the least, there was the appearance of the process of extradition being permitted to be made use of, not for the ostensible public purpose which could justify the resort to it, but to afford to private litigants the opportunity of securing the enforcement against the appellant of an asserted civil liability.

Smith v. Government of Canal Zone et al., 249 Fed. 273, 277-279 (1918).

CHAPTER XIII
INTERNATIONAL COMMUNICATIONS
ELECTRICAL COMMUNICATIONS
SUBMARINE TELEGRAPH CABLES

PROTECTION

§349

The convention for the protection of submarine cables signed at Paris on March 14, 1884 is applicable to submarine cables "outside of the territorial waters" landed in the territories, colonies, or possessions of the states party to the convention; and "the breaking or injury of a submarine cable, done willfully or through culpable negligence, and resulting in the total or partial interruption or embarrassment of telegraphic communication" is to be "a punishable offense" (art. II) in the courts of the country "to which the vessel on board of which the infraction has been committed belongs" (art. VIII). The convention further provides that the owner of a cable who by the laying or repairing of it causes the breaking or injury of another cable shall be required to pay the cost of the repairs rendered necessary (art. IV); that, when a vessel engaged in repairing a cable carries appropriate signals, other vessels shall keep at a distance therefrom of at least one nautical mile (art. V); that vessels able to see buoys designed to show the position of cables that are being laid or are out of order or broken, shall keep at a distance therefrom of one quarter of a nautical mile (art. VI); that owners of vessels who can prove that they have sacrificed an anchor, a net, or any other implement used in fishing, in order to avoid injuring a submarine cable, shall be indemnified by the owner of the cable (art. VII); that prosecutions for infractions contemplated by articles II, V, and VI shall be instituted "by the State or in its name" (art. IX); and that the stipulations of the convention "shall in no wise affect the liberty of action of belligerents" (art. XV).

24 Stat. 989; 2 Treaties, etc. (Malloy, 1910) 1949.

"There is no permanent organ charged by the member states with watching over the operations of the convention. A bureau was suggested

when the five Latin nations made the first treaty concerning submarine cables in 1864, but no such organ was considered in the conferences which developed the treaty of 1884. A commission was set up in 1909 by the Lisbon Telegraph Conference, in order to promote amity between the cable companies and the fishing industry but that commission was not permanent. It may be noted, however, that the International Telegraph Bureau at Berne, which is also charged with the information service and whatever of supervisory service is connected with the International Radio Telegraph Union, does not neglect the oceanic cable, in its reports, in its suggestions, and in the pages of the official *Journal*." Keith Clark, *International Communications* (1931) 138. See *ibid.*, ch. III, for a brief background and analysis of the convention and the subsequent declaration and final protocol relating thereto.

An act of Congress to carry into effect the convention was approved on Feb. 29, 1888. 25 Stat. 41 Jurisdiction over all offenses under the act and of all suits of a civil nature arising thereunder, whether the infraction was committed within or without the territorial waters of the United States, is vested in the District Courts of the United States, provided that when the infraction occurs outside of American territorial waters the vessel on board which it has been committed is a vessel of the United States (sec. 13).

Acting under instructions from the Department of State, the Ambassador in London addressed the British Secretary of State for Foreign Affairs, on May 27, 1908, as follows:

... four out of the five Transatlantic cables belonging to the Commercial Cable Company have been made useless through damages done by English trawlers fifty miles off the West Coast of Ireland. . . .

My Government instructs me to refer to the obligations in such a case under the Submarine Cable Convention between Great Britain, the United States and twenty-four other nations, entered into at Paris on the 14th of March 1884; and to express its confidence that the matter will have your immediate attention. . . .

... It is believed by the representatives of the Company here that the ground thus occupied by the cables is so small that no serious injury to the fishing industry could be caused by a complete exclusion of trawlers from this danger zone. They have in fact communicated to me an assurance by Mr. Heron, Managing Director of six trawling Companies in Swansea, Wales, to the effect that closing this cable zone to them would probably not cause an appreciable derangement of their industry.

I may add, as tending to show the gravity of the situation, that a complaint has already reached me from one of the great international news agencies, as to the increasing difficulty of getting their despatches transmitted.

In further reference to the subject, the Ambassador again communicated with the British Foreign Office on May 30, 1908 as follows:

... I beg to mention a further despatch from my Government, advising me of representations from the Commercial Cable

Company to the effect that all the Cable Companies have suffered from the same cause, and that at present nearly one half of all the Atlantic cables are out of commission on account of injuries due to trawlers.

My Government repeats to me the suggestion that all deep sea trawling should be prohibited on the South-West coast of Ireland within the so-called danger zone.

On June 15, 1908 the Ambassador placed at the disposal of the Foreign Office a section of a damaged cable, fished up by the Commercial Cable Company's repair ship and found to have attached to it fragments of a trawler's net. Similar injuries to cables of the Western Union Telegraph Company, alleged to be the result of operations of trawlers, were called to the attention of the Foreign Office by the Ambassador.

Ambassador Reid to Sir Edward Grey, May 27, 1908 (enclosure in despatch 620 from the Embassy in London, May 29, 1908), and May 30, 1908, MS. Department of State, files 18674/15-19 and /45-51.

On Sept. 16 an interdepartmental committee appointed by His Majesty's Postmaster General to inquire into the matter made the following report of its findings and recommendations:

"(A) The Committee are of opinion that injury is sometimes caused to submarine cables by otter boards of certain types and boards out of repair, and by beam trawls with defective trawl-heads.

"(B) They think that there would be little risk of injury from trawls of either kind if they were always suitably constructed and in good condition.

"(C) They find that the owners of trawling vessels are generally willing, and indeed anxious, to modify their trawling gear with the view of minimizing the risk.

"(D) They are not prepared to recommend the proscription of any area beyond territorial limits.

"(E) They recommend that all Cable Companies should (as certain companies and the Post Office have already done) establish friendly relations with the fishermen who frequent the waters in which their cables are laid; while the fishermen on their part should try to clear their trawls when they foul a cable, and should report the position of any contact with a cable.

"(F) They recommend that a system of Government inspection of the gear of trawlers be at once instituted.

"(G) They recommend that steps be taken through the diplomatic channel to invite neighbouring foreign States to adopt a similar system of inspection.

"(H) They think that eventually an International Conference may be necessary to settle the terms of a Convention on the subject.

"(I) They recommend that the Cable Companies should consider the question of substituting heavier types of cable in the areas affected."

Subsequently, in 1909, arrangements were made by the Board of Agriculture and Fisheries for an inspection of trawling gear along the lines recommended by the committee.

Report of Interdepartmental Committee on Injuries to Submarine Cables, etc., p. xli (enclosure in letter from the Commercial Cable Co. to Secretary Root, Nov. 16, 1908), MS. Department of State, file 13674/73-74.

London,
1913

A preliminary conference for the further protection of submarine telegraph cables was held in London in 1913. Representatives of Belgium, Denmark, France, Germany, Netherlands, Norway, Portugal, Spain, Sweden, and United Kingdom participated. Resolutions were adopted to the effect that "all gear used in trawling should be constructed in such a manner and maintained in such a condition as to reduce to a minimum the danger of entanglement with submarine cables" (resolution I); that each Government should make provision for inspection of otter-boards or other trawling gear on vessels of its nationality (resolution II); that each Government should appoint for each port a suitable authority to receive declarations with respect to losses sustained by an owner of a vessel in order to avoid injuring a submarine cable, for which indemnification is to be made by the owner of the cable under article VII of the 1884 convention, referred to *ante*, p. 243 (resolution III); that the maritime population should be informed of "the nature and use of submarine cables, the danger, inconvenience and expenses which result from any damage" thereto, "the compensation which may be claimed for any sacrifice of ship's gear", the means of disengaging an anchor hooked in a cable—"explaining that force must not be used, but that it is better to sacrifice the anchor and claim compensation"—and the penalties contemplated under the convention of 1884 for damage to submarine cables caused wilfully or by culpable negligence (resolution IV); and that the various countries should exchange information of a technical character relative to certain phases of the problems involved (resolution V).

Paris,
1925

The International Telegraph Conference held in Paris in 1925 expressed the opinion that the governments concerned should do their utmost to arrange for the strict application of the above resolutions.

Gt. Br., Parliamentary Papers (1913), Cd. 7079; *International Telegraph Convention of Saint-Petersburg and Service Regulations Annexed, Revision of Paris, 1925* (London, 1926) 138-139.

In 1927 the Institute of International Law adopted, at its session in Lausanne, a *vox* that the various states agree to ratify the rules proposed in London in 1913 and that they insist that the proprietors or lessees of submarine cables simplify the formalities for the reimbursement for the loss by fishermen or navigators of machinery or apparatus destroyed or abandoned to preserve submarine cables. 22 A.J.I.L. Spec. Supp. (1928) 338.

In denying the right of the United States to recover for damages to a cable allegedly caused by a steamship in the harbor of Valdez, the District Court of the District of Alaska said:

"Under the treaty of 1884 between the United States and various other countries relating to submarine cables, it is provided that the owner of the cable will compensate the owner of any vessel which loses its anchor or other equipment in avoiding injury to the cable.

"Counsel for libellant lays particular stress on the case of *Davidson S.S. Co. v. United States*, 205 U.S. 193, 27 Sup. Ct. 482, 51 L. Ed. 764, citing from the opinion in this case:

"It . . . appears [in the above-cited case] that the obstruction to navigation was generally known to mariners, that the knowledge thereof could easily have been obtained by the captain, and further that official circulars were mailed to him giving notice thereof, which is quite a different state of affairs from that in the case at bar, where it is not even shown that any information could have been obtained by the captain of the *Alameda*, had he sought it, that the location of such cable was not generally known, and that all the other sea captains mentioned had no notice thereof, and did not consider that they were lacking in care and prudence in not knowing such location."

United States v. The Alameda et al., 5 Alaska 663, 667-668 (1917).

For the award of the tribunal established under the special agreement of Aug. 18, 1910 in the case of the *Great Northwestern Telegraph Company* (Great Britain v. United States) for injury to a telegraph cable caused by the American gunboat *Essex* in dropping her anchor in a reserved space in Quebec harbor and fouling the cable, see Nielsen's Report (1926) 436. The United States admitted liability in this case.

LANDING LICENSES

§350

In an instruction to the Ambassador to Great Britain in 1919 the Department of State described the procedure at that time regarding the granting of permits to land cables in the United States as follows:

As there is no legislation of Congress at the present time governing the subject, permits to land cables in the United States are granted by the President, by virtue of his power as director of the relations of the Government with foreign powers, and as Commander in Chief of the Army and Navy. The permit for license is granted by the President through the Department of State, after negotiations conducted by the Department of State with the diplomatic agents of the country of the cable company desiring the permit to land; or in case the cable company is an American company, with the officers of the company directly. The approval of the War Department in the form of a license governing the conditions of the physical laying of the cable must also be obtained.

The Third Assistant Secretary of State (Long) to the Ambassador in London (Davis), no. 324, July 31, 1919, MS. Department of State, file 841.73/10.

Landing of
Western
Union
Telegraph
Co. cable
at Miami

In July 1919 the Western Telegraph Company, a British corporation, entered into a contract with the Western Union Telegraph Company, an American corporation, by the terms of which the former agreed to lay a submarine cable from Brazil to Barbados and the latter agreed to lay and maintain a cable from Miami, Florida, to Barbados. The two parties agreed to equip and maintain a joint station at Barbados and respectively to transmit messages over the resulting "through line" to South America and Europe.

The Department of State declined to recommend to the President that a permit be issued for the landing of the cable at Miami because of the proposed connection between the Western Union Telegraph Company's lines and those of the Western Telegraph Company, which, by grant of the Brazilian Government, enjoyed a monopoly of interportal connections in Brazil. The Western Union Telegraph Company nevertheless attempted to lay a cable from Miami to Barbados without a permit. On July 30, 1920, the Secretary of State informed the British Ambassador in Washington that the British cable-ship *Colonia* was on its way to Miami to land the cable although a permit had been withheld, and that measures had been taken by the Government of the United States physically to prevent such landing. It was suggested that the Ambassador convey a timely warning to the master of the *Colonia*. The cable was subsequently laid by the *Colonia* from a point just outside of the three-mile limit off Miami Beach. The Western Union Telegraph Company, having failed to land the cable, planned to splice into it a branch cable to connect at Cojimar, Cuba, with three cables which had been theretofore maintained and operated by it from that point to Key West, Florida.

Secretary Colby to Sir Auckland Geddes, July 30, 1920, MS. Department of State, file 811.73/235a. See also 1920 For. Rel., vol. II, p. 687.

Cancellation
of Western
Union
concession
in Cuba

The Western Union Telegraph Company obtained from the Government of Cuba in 1920 a concession allowing it to land at Cojimar a direct cable from Barbados. On December 24, 1920 the company's permit to land at Cojimar was suspended by the President of Cuba. On January 14, 1921 the Department of State instructed the Minister to Cuba to communicate orally and informally to the President a statement—

that the Government of the United States had not felt at liberty to request the Cuban Government to suspend the landing permit because of the fact that the granting or the refusal of this landing permit was, of course, a matter within the sovereign rights

of the Cuban Government; that although it would be objectionable and detrimental to the interests of the United States if such cable in violation of the policy of the United States and of the landing permit granted on November 20, 1920 by the United States to the Western Union Company, regulating the operation of its cables between Key West and Cojimar, were used for transmitting through messages from the United States to Barbados and from thence to Brazil, in which latter country the connecting company enjoys monopolistic privileges, the Department had not felt justified in requesting the Cuban Government to assist in a controversy between the United States and an American corporation.

The Minister was authorized to say that the United States reserved the right to protest to the Cuban Government later if the Cuban landing permit should be again granted to the Western Union and if it should be ascertained later that the landing of that cable in Cuba had been used by the company as a subterfuge and as a means of violating the conditions under which messages were permitted to pass between Key West and Cuba. The Minister was also informed, on January 29, 1921, that the United States would not support any claim of the Western Union for indemnity based on the suspension of its landing permit in Cuba since article III thereof expressly provided for its suspension when it was deemed proper for the protection of the public interest and since the United States believed that the landing license in Cuba had been obtained to circumvent any action it might take to prevent the landing of the cable at Miami Beach.

The Chargé d'Affaires in Cuba (White) to the Secretary of State (Colby), no. 253, July 10, 1920, MS. Department of State, file 837.73/6; Minister Long to Acting Secretary Davis, telegram 360, Dec. 24, 1920, *ibid.* /27; Mr. Davis to Mr. Long, telegram 16, Jan. 14, 1921, and Mr. Colby to Mr. Long, telegram of Jan. 29, 1921, *ibid.* /32. See also 1920 For. Rel., vol. II, pp. 60, 69; 1921 For. Rel., vol. I, pp. 816, 822. For the text of the license of Nov. 20, 1920, see MS. Department of State, file 811.73/461.

Suit was instituted by the Western Union Telegraph Company against the Secretaries of State, War, and the Navy to enjoin them from interfering with its acts. A suit in equity was thereupon brought by the United States against the company to prevent it from making the allegedly unauthorized cable connection between the shores of the United States and a foreign country. A motion by the Government for a preliminary injunction was denied by the District Court of the United States for the Southern District of New York on February 25, 1921. Judge A. N. Hand, in the course of the opinion, stated:

. . . The government . . . contends that the Executive has the power to prevent the landing of cables and other physical connection of foreign countries with this country, because Congress has long acquiesced in executive regulation of such matters in cases

*U. S. v.
Western
Union
Telegraph
Co.*

where Congress has not acted. From the time of the administration of President Grant there has been frequent and growing insistence by the Executive upon the right to regulate the landing of cables connecting with foreign countries, and this alleged prerogative has been recently extended to grant permits to light lines, oil lines, telephone lines, aerial railways, and pipes for the disposal of waste from the manufacture of soda ash. The exercise of this executive power has been acquiesced in by various corporations, who perhaps found it easier to accept a permit than to attempt to resist the Executive. President Grant, in a message to Congress in December, 1875, referred to a French company which proposed to lay a cable from the shores of France to the United States. President Grant stated in his message that he could not concede that any power should claim the right to land a cable on the shores of the United States and at the same time deny to the United States or to its citizens or grantees an equal right to land a cable on its shores.

President Grant . . . set forth conditions which he thought should be exacted before allowing foreign cables to land, and said:

"I present this subject to the earnest consideration of Congress. In the meantime, and unless Congress otherwise direct, I shall not oppose the landing of any telegraphic cable which complies with and assents to the points above enumerated, but will feel it my duty to prevent the landing of any which does not conform to the first and second points as stated, and which will not stipulate to concede to this government the precedence in the transmission of its official messages and will not enter into a satisfactory arrangement with regard to its charges."

There is attached to the moving papers letters from Secretaries of State Fish, Evarts, Blaine, and Day (now Mr. Justice Day) requiring executive permits, as well as from Secretary Bayard and Secretary Root, and Attorneys General Griggs, Knox, Wickersham, and McReynolds (now Mr. Justice McReynolds). The only break in this continuous position taken by the Executive Branch of the Government for the last 50 years was during the administration of President Cleveland. Secretaries Gresham and Olney declined to exercise the power upon the ground that presidential action would not be binding upon Congress, and that the President was without power.

In 1898 Acting Attorney General Richards (22 Op. Attys. Gen. 25-27) rendered an elaborate opinion in regard to this matter in which he summarized the position of the government by saying:

"I am of the opinion, therefore, that the President has the power, in the absence of legislative enactment, to control the landing of foreign submarine cables. . . ."

. . . While the original power of the President in such matters is questionable, the long-continued practice of the Executive, after a formal message to Congress by President Grant regarding foreign cable connections, may indicate their willingness to have the Executive take the kind of action that is here insisted upon in

cases where there is no appropriate legislation covering the subject-matter.

Judge Lacombe, in the case of *United States v. La Compagnie Francaise, etc.* (C.C.) 77 Fed. 495, where a cable company having no franchise under the Post Roads Act was involved, said that—

"Without the consent of the general government, no one, alien or native, has any right to establish a physical connection between the shores of this country and that of any foreign nation. Such consent may be implied as well as expressed, and whether it shall be granted or refused is a political question, which, in the absence of congressional action, would seem to fall within the province of the Executive to decide."

. . . It may be that the President, before Congress has acted, may exercise this power in respect to a foreign cable company having no congressional franchise. This is claimed to have been substantially the situation in the case of the French Cable Company, decided by Judge Lacombe. But in respect to the Western Union, which by the Act of July 24, 1866 (*supra* [14 Stat. 44]) possesses a federal franchise covering a business with foreign countries and regulated as to rates by an agency of the government created by Congress, it seems unreasonable to hold that Congress has not occupied the field and legislated so generally in regard to this defendant that it has withdrawn it from the exercise of executive power in respect to foreign cable connections.

United States v. Western Union Telegraph Co., 272 Fed. 311, 316-322 (S.D.N.Y., 1921). The Circuit Court of Appeals, on Mar. 10, 1921, affirmed the order denying the preliminary injunction. 272 Fed. 893 (C.C.A. 2d, 1921).

On May 27, 1921 an act was approved (the so-called "Kellogg act") forbidding the landing or operation in the United States of any submarine cable directly or indirectly connecting the United States with any foreign country without a written license from the President. Section 2 provides:

. . . That the President may withhold or revoke such license when he shall be satisfied after due notice and hearing that such action will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States, or may grant such license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed: *Provided*, That the license shall not contain terms or conditions granting to the licensee exclusive rights of landing or of operation in the United States . . .

Section 3 empowers the President to prevent the landing of any cable about to be landed in violation of the act and confers jurisdiction on District Courts of the United States to enjoin the landing or opera-

tion of such a cable or to compel by injunction the removal thereof. 42 Stat. 8.

By Executive order issued July 9, 1921 the President directed that the Secretary of State should receive all applications for licenses for the landing or operation of cables and, after obtaining from any department of the Government such assistance as he might require, should inform the President with regard to the granting or revocation of such licenses.

Ex. Or. 3513, July 9, 1921, MS. Department of State, file 811.73/709. See G. G. Wilson, "Landing and Operation of Submarine Cables in the United States", in 16 A.J.I.L. (1922) 68-70.

Executive Order 3513 of July 9, 1921 was amended in 1934 to read:

" . . . the Federal Communications Commission is hereby authorized and directed to receive all applications for licenses to land or operate submarine cables in the United States, and, after obtaining approval of the Secretary of State and such assistance from any executive department or establishment of the Government as it may require, it shall advise the President with respect to the granting or revocation of such licenses." Ex. Or. 6779, June 30, 1934.

On May 1, 1922 a license was issued to the Western Union Telegraph Company to land its cable from Barbados at Miami Beach, Florida, upon the condition that the cable would be sealed and would not be operated or connected with the company's land lines until a license "to land and operate" the cable had been granted. On August 12, 1922 a license for 30 days was issued to it to land and operate its cable at Miami Beach for the purpose of carrying messages between the United States and Europe. The granting of a final license to the company was conditioned on the waiver by the Western Telegraph Company and by the All America Cables Company, Inc. (an American corporation), of their exclusive privileges in South America. The Department of State insisted that not only should such waivers be executed by the above-mentioned companies but also that satisfactory expressions of acquiescence should be obtained from such governments of South America as were concerned. The waivers having been executed and satisfactory expressions having been received from the Governments of Brazil, Argentina, and Uruguay, in which the Western Telegraph Company had held exclusive privileges, and from the Governments of Ecuador, Colombia, and Peru, in which the All America Cables Company had held exclusive privileges, a license to land and operate a cable from Miami Beach to Barbados was issued to the Western Union Telegraph Company on August 24, 1922.

MS. Department of State, file 811.73W52/77, /80, /92. See also 1922 For. Rel., vol. I, pp. 518-538.

On Oct. 13, 1922, the Government having appealed from the decision of the Circuit Court of Appeals (*ante*, p. 251), a joint suggestion and stipulation was filed by the parties to the case of the *United States v. Western Union*

Telegraph Company suggesting that, in view of the enactment of the act approved May 27, 1921 and the issuance to the Western Union Company of a license thereunder in respect to the cable in controversy, the case was moot. An order was entered by the Supreme Court on Oct. 23, 1922 remanding the case to the District Court with directions to enter a decree dismissing the bill without prejudice and without costs to either party. 260 U.S. 754 (1922). For a copy of the joint suggestion and stipulation, see MS. Department of State, file 811.73W52/109.

The Secretary of State, on Sept. 29, 1922, requested a formal statement from the Attorney General for the guidance of the Department of State in dealing with cases where telegraph or telephone lines, power-transmission lines, pipe lines, or other agencies had been constructed or were to be constructed connecting the United States with a foreign country. The Attorney General replied that—

"the disposal of the Western Union Telegraph Company case by stipulation, on the ground that the question at issue was moot, could not affect prejudicially, or otherwise, any right that the President may have in the matter above indicated. In the Western Union Telegraph Company case the Government contended that even when not specifically authorized by Congress, the President had an inherent right to prevent such connections between this and foreign countries. The District Court for the Southern District of New York decided against this contention, and that was the subject of the appeal in the Supreme Court of the United States. In that case the question of power became moot by reason of the passage of an Act of Congress which conferred upon the President the disputed authority. The decision of the District Court was, therefore, reversed and the case remanded to dismiss the Government's bill 'without prejudice.' Therefore the power of the President, in the absence of Congressional authority, is, so far as that case is concerned, exactly where it was before; for while the decision of the District Court remains, the dismissal of the suit without prejudice clearly indicates a right of the Government at any time to assert the inherent power of the President above referred to. This would be true even in the case of a cable sought to be laid by the Western Union Telegraph Company; for the dismissal without prejudice prevents the case from being *res adjudicata* as between the Government and the Western Union Telegraph Company. *A fortiori* this disposition of the case cannot affect the Government as to other companies and as to other possible conflicts in cases arising under different circumstances." Attorney General Daugherty to Secretary Hughes, Nov. 15, 1922, MS. Department of State, file 811.73W52/112.

On April 22, 1930 the Department of State said in a letter to the President of the Western Union Telegraph Company that, since the issuance of the license to the Western Union Company on August 24, 1922, the All America Cables Company, Inc., had been attempting to procure in Brazil rights of interportal operation and that such rights had not been obtained because of the opposition of the Western Telegraph Company, which, it was alleged, still asserted the possession of monopolistic rights in Brazil and, in particular, exclusive right to the interportal operation of cables on the Brazilian coast. The Department quoted from a memorandum filed by the Western Telegraph

Company with the Director General of Telegraphs in Brazil, which stated that the waiver of special rights signed by it in 1922 referred to international communications only, without including its Brazilian intercoastal monopoly, and which objected to the granting by the Brazilian Minister of Foreign Affairs to the All America Cables Company, Inc., of any concession that permitted it to handle intercoastal traffic. The Department observed in its letter that the landing license of August 24, 1922 required that neither the Western Union Telegraph Company nor any company with which it was associated should oppose in any way the landing, connection, or operation by any American company of cables in South America on terms of equality.

On May 9, 1930 the Department of State instructed the Ambassador in Brazil to inform the Brazilian Foreign Office that the Government of the United States hoped that, in accordance with the spirit of the compromise for the waiver of special rights in South American countries by British and American cable companies, reached in 1922 and assented to by the Brazilian Government, the Government of Brazil would accord to the All America Cables Company, Inc., the same rights for the carriage of local interportal traffic as were enjoyed by the British Western Telegraph Company.

On January 11, 1935 the *Jornal do commercio* announced that a decree had been signed by the President of Brazil authorizing the All America Cables Company, Inc., to lay a submarine cable between Rio de Janeiro and Santos and to handle internal and international messages on land telegraph lines connected with its stations.

The Acting Secretary of State (Cotton) to Mr. Carlton, Apr. 22, 1930, MS. Department of State, file 832.73A15/51; Secretary Stimson to the Embassy in Brazil, telegram 24, May 9, 1930, *ibid.* /36; the Consul General at Rio de Janeiro to Secretary Hull, Jan. 11, 1935, *ibid.* /65.

Cables
landed
without
license
prior to
May 27, 1921

In 1922 the Compagnie Française des Câbles Télégraphiques addressed a letter to the Secretary of State relating to the four cables which it was operating in the United States. Three of the cables had been landed in the United States prior to 1899 without a presidential license therefor, although one of these, extending from Cape Cod to St. Pierre-Miquelon, had been landed in 1879 pursuant to permission contained in a letter addressed by the Secretary of State to the French Minister on November 10, 1879. See II Moore's Dig. 457. Inquiry was made whether under the circumstances it was necessary for it to comply with the requirements of the act approved May 27, 1921 (the Kellogg act, *ante*, p. 251). The Department of State replied that in its view application should be made for permission to land and operate the cables in the United States.

Compagnie Française des Câbles Télégraphiques to Secretary Hughes, Aug. 15, 1922, and Assistant Secretary Harrison to the Compagnie Française

des Câbles Télégraphiques, July 21, 1923, MS. Department of State, file 811.7351C731/2.

The letter of the Office of the Chief of Engineers raises the question whether the Act approved May 27, 1921, entitled "An Act Relating to the Landing and Operation of Submarine Cables in the United States" requires a Presidential license to authorize the laying of a cable between two points in one of the states of the United States which are separated by a portion of the high seas. This question was considered in relation to the desire of the Pacific Telephone and Telegraph Company to lay and maintain two cables between San Pedro, California, and the Santa Catalina Island. The Department adopted the view that a license need not be obtained for a cable connecting two points in the same state. It would seem that the application of the Western Union Telegraph Company for a permit to lay a cable between Key West and Punta Rassa [in Florida] raises the same question . . . It is the view of the Department that a Presidential license need not be obtained to authorize the Western Union Telegraph Company to lay a cable between Key West and Punta Rassa.

Intrastate

The Secretary of State (Hughes) to the Secretary of War (Weeks), Jan. 28, 1924, MS. Department of State, file 811.73/713. The War Department accepted the view of the Department of State. Mr. Weeks to Mr. Hughes, Feb. 4, 1924, *ibid.* /714.

For a statement indicating that it is the general policy of the United States (1) not to grant monopolistic or exclusive rights for the landing of submarine cables or the erection of radio stations, (2) not to support, diplomatically or otherwise, nationals seeking exclusive cable or radio concessions, and (3) not to prevent the granting of exclusive or privileged concessions for a reasonable term of years in cases where the probable traffic would not be sufficient to yield a fair return upon the capital invested in more than one system for the operation of the service in question, see the Assistant Secretary of State (Johnson) to the Minister in China (MacMurray), no. 1337, Sept. 4, 1929, MS. Department of State, file 893.73/57, referring to the Report of Subcommittee on International Cable and Radio Law and on Cable Landing Rights, *ibid.* 574.D1/411a; 1920 For. Rel., vol. I, p. 159.

In view of the statement contained in your Commission's letter of May 16, 1939 that "the power to revoke a cable license, even though issued at the outset on a permanent basis, is provided for by law as well as by the terms of the proposed license itself," this Department is inclined to agree with your Commission that "it would appear that the Government's control would be thereby adequately safeguarded without the necessity of issuing it on a temporary basis for one year only".

Revocation

The Assistant Secretary of State (Messersmith) to the Chairman of the Federal Communications Commission (McNinch), June 16, 1939, MS. Department of State, file 811.73W521/28.

The license under discussion as finally issued and signed by the President was for an indefinite period, revocable at the will of the Government. The chairman of the Federal Communications Commission (Fly) to Presi-

dent Roosevelt, Sept. 7, 1939, *ibid.* 811.73W521/32; Mr. Messersmith to Mr. Fly, Sept. 27, 1939, *ibid.* /30

For the text of Executive Order 3360-A, issued Nov. 20, 1920 by President Wilson, canceling a cable permit issued to the Deutsch-Atlantische Telegraphengesellschaft in 1899, see 1920 For. Rel., vol. I, pp. 141-142.

Transfer

This is to advise that the President of the United States has given his consent, subject to certain conditions, for the rights and privileges conferred by the four presidential licenses dated February 21, 1923, authorizing the landing of six cables at Far Rockaway, New York, to be transferred from the Postal Telegraph-Cable Company to the Commercial Cable Company. There is enclosed herewith a document executed by the President on March 11, 1939 containing such consent and setting forth the conditions upon which the same is given.

Your attention is invited particularly to condition number (2), which provides that the terms and conditions upon which the licenses were given, and upon which consent is given to the transfer thereof, shall be accepted by a duly authorized officer of the Commercial Cable Company, and evidence of said acceptance shall be filed with the Federal Communications Commission.

The Federal Communications Commission to the Postal Telegraph-Cable Company, Mar. 15, 1939, MS. Department of State, file 811.73P84/25.

After consideration of the court order dated January 20, 1940 and the statements set forth in your letter, you are advised that on the understanding that The Commercial Cable Company is an American-owned corporation, this Department consents to the sale of this property by the Postal Telegraph-Cable Company (New York) to The Commercial Cable Company, in accordance with the ninth condition contained in the four cable landing licenses issued by the President of the United States on February 21, 1923 permitting the landing of six cables on the shores of the United States. The Department desires to receive a statement concerning the nationality of the owners of the stock of The Commercial Cable Company.

The Counselor of the Department of State (Moore) to Chadbourne, Wallace, Parke & Whiteside, Jan. 25, 1940, MS. Department of State, file 811.73P84/28.

CABLE CONCESSIONS ABROAD

§351

On December 31, 1925 the Department of State wrote to the President of the Western Union Telegraph Company that it was "not within the province of the Department to make applications to foreign governments for concessions on behalf of American companies, its action in such matters being limited to supporting American citizens or concerns in appropriate cases in their efforts to obtain concessions or modifications of existing concessions".

Secretary Kellogg to Mr. Carlton, Dec. 31, 1925, MS. Department of State, file 811.7353bW52/257.

On January 9, 1920 the Department of State instructed the Ambassador in France to present to the French Foreign Office the request of the Western Union Telegraph Company for permission from the French Government to connect freely with and operate through the land lines of the French administration and to maintain terminal offices for the acceptance and delivery of messages dealing directly and freely with the French public in all matters pertaining to the acceptance, transmission, and delivery of, and accounting for, all messages over the Western Union system. The Ambassador was instructed that, in presenting the company's request to the Foreign Office, he should call attention to the basis of reciprocity on which cable connections between the United States and France had been inaugurated and maintained. After quoting from the note of November 10, 1879 from the Secretary of State to the French Minister in Washington, granting landing privileges to the Compagnie Française du Télégraphe de Paris à New York (see II Moore's Dig. 457), the Department said:

Cable
offices

Further, in the memorandum of conditions submitted by the Government of the United States in connection with that cable landing, is to be found the following:

"First. That the company receive no exclusive concession from the Government of France which would exclude any other line which might be formed in the United States from a like privilege of landing on the shores of France and connecting with the inland telegraphic system of that country."

A similar provision is to be found in the landing permit granted the French Cable Company on August 23, 1917, for the re-landing of the cable of the German Cable Company, which was seized by the French Government during the war.

As the enjoyment of the privilege of maintaining terminal offices and dealing directly with the general public is necessary to the full utilization of landing privileges accorded a cable company, it follows, in view of the understanding between the Governments of the United States and France that reciprocity of treatment should be accorded cable companies of either of the two countries desiring landing privileges on the shores of the other, that the Western Union Company should be accorded privileges in France similar to those accorded the French Cable Company in the United States. It would seem especially just that such treatment should be accorded in view of the connection which is understood to exist between the French Government and the French Cable Company.

Previously, in 1919, the Department had similarly instructed the Ambassador to support the application of the Commercial Cable Company for the privilege of opening all necessary offices in Paris.

The French Foreign Office replied in respect to both companies that the permission could not be granted, since it was contrary to the spirit governing the French telegraphic service, which was a state monopoly. In a communication dated March 3, 1920, addressed to the Ambassador, the Foreign Office said:

The principle to apply in this question is the equality of the advantages granted in each country to national companies.

In a further note of October 12, 1920 the Foreign Office referred to the "monopoly instituted by the law of November 29, 1850", article I of which provided:

All persons of established identity are allowed to correspond by means of the electric telegraph of the State, through the intermediary of the officials of the Telegraphic Administration.

With reference to the agreements between the French and American Governments at the time of the landing of the first cables of the French Cable Company in the United States, the Foreign Office said:

By examining them with care it will indeed be perceived that the reciprocity granted applies solely to the landing right of the cables, and not to the right of operation. As for the French Government it would have been precluded from concluding such an agreement inasmuch as from the very first the use of the telegraph in France was reserved to State administration. The two Governments simply undertook to abstain from granting to Companies of their own nationalities any privileges they might refuse to foreign Companies (American in France or French in the United States). No identity of treatment was provided in regard to cable companies in the United States and in France.

The Department instructed the Ambassador on April 25, 1921 to inquire whether the law of November 29, 1850 was not intended solely for the purpose of preventing telegraphic installations without the consent of the Government, as apparently there was nothing in the law to forbid the Government from granting any concession it might decide to make. He was instructed to add that an examination of the French laws on the subject did not disclose any law expressly forbidding the French Government to grant the applications. The Ambassador was instructed further:

. . . You will also state that in any event the reference of the French Government to the law of November 29, 1850, as having created a monopoly in favor of the French Government for communication by telegraph, is not considered by this Government as responsive to its representations that American cable companies

doing business in France should be given more liberal treatment than they at present enjoy. If the granting of such treatment is prohibited by existing French law, it is the view of this Government that the law should be modified so as to make it possible for the French Government to accord to these American companies a measure of the liberal treatment accorded French companies in the United States. You will remind the Foreign Office that at the present time the French Cable Company has seven offices in New York City at which messages are received from the public and from which messages are delivered to the public; that the French company also leases and owns land lines in the United States between its various telegraph offices and its cable termini at Coney Island, New York, and Cape Cod, Massachusetts, and that these privileges in the United States are identical with those enjoyed by American cable companies. The desirability for reciprocity in these matters will doubtless be apparent to the French Government. Presumably, the French Government does not expect that the French Cable Company should continue to enjoy the liberal treatment now accorded it under the laws of the United States, if American cable concerns in France are deprived of the facilities necessary to efficient operation there.

In August 1922 the French Government indicated its willingness to grant to the Commercial Cable Company the right to open to the public one office in France, the personnel of which would consist of officials of the French Department of Posts and Telegraphs; this concession, it was said, should coincide with the satisfactory settlement of the question of the German cables (surrendered by the German Government to the Allied Powers under article 244 and annex VII thereto of the Treaty of Versailles). Upon receipt of this information, the Department transmitted to the American Ambassador, on November 1, 1922, copies of letters received from the Commercial Cable Company and the Western Union Telegraph Company, respectively, with regard to agreements which had been concluded with the Government of the Netherlands for opening cable offices by those companies in Holland for dealing direct with the public. The Ambassador was instructed to inform the French Foreign Office of the favorable action taken by the Government of the Netherlands and to urge the French Government to extend similar treatment to the American cable companies in question.

Secretary Lansing to the Embassy in Paris, telegram 9374, Dec. 19, 1919, MS. Department of State, file 851.73/93a; the Second Assistant Secretary of State (Adee) to Ambassador Wallace, no. 325, Jan. 9, 1920, *ibid.* /94; Mr. Wallace to the Secretary of State ad interim (Polk), telegram 644, Mar. 6, 1920, *ibid.* /101; the Secretary General of the French Ministry of Foreign Affairs (Berthelot) to Mr. Wallace, Oct. 12, 1920 (enclosure in despatch 1703 from the American Embassy in Paris, Oct. 13, 1920), *ibid.* /121; Secretary Hughes to Mr. Wallace, no. 818, Apr. 25, 1921, *ibid.* /171; the Minister of Foreign Affairs (Poincaré) to the Chargé d'Affaires (Whitehouse), Aug. 30,

1922 (enclosure in despatch 2284 from the Embassy in Paris, Sept. 1, 1922), Assistant Secretary Harrison to Ambassador Herrick, no. 463, Nov. 1, 1922, *ibid.* /227. See also 1922 For Rel., vol. II, pp. 154-159.

On November 25, 1930 the Minister at Shanghai informed the Department of State that the Commercial Pacific Cable Company had been negotiating with the Chinese Government for a continuance of cable service after the expiration of its existing contracts. The Chinese were demanding, he said, as a condition to the operation of the cables, that the terminus should be placed under Chinese control. It was possible, he added, that the Chinese would permit an office to be managed by the cable company but would insist on the supervision and complete control over the relations of the company with the public, the same conditions being demanded of other cable companies. The Department informed the Minister that it felt that it would be neither practicable nor advisable to object to control by the Chinese Government of cables in Chinese waters and on Chinese territory unless there should be discrimination against an American company. The Minister was instructed, however, to point out that the Government of the United States would be gratified if, with a view to encouraging all communications enterprises, the Government of China would extend treatment that was not less liberal than that accorded by the Government of the United States, namely, extending to cable companies the privilege of conducting relations freely with the public.

Minister Johnson to Secretary Stimson, telegram 1002, Nov. 25, 1930, and Mr. Stimson to Mr. Johnson, telegram 416, Dec. 3, 1930, MS Department of State, file 811.7393C73/46.

On Dec. 30, 1930 an agreement for renewal of landing rights was signed by the Commercial Pacific Cable Co. and the Minister of Communications at Nanking. The agreement provided for the joint control of an office at Shanghai by the Chinese Telegraph Administration and the company. The Consul General at Shanghai (Jenkins) to the Secretary of State (Stimson), Dec. 31, 1930 (telegram), *ibid.* /47

Most-favored-nation clause

On July 16, 1909 the Department of State instructed the Minister in Argentina to inform the Argentine Minister of Foreign Affairs that the Government of the United States supposed that in making a cable-concession contract with the Western Telegraph Company, Ltd., a British corporation, the Argentine Government did not intend any infringement of the provisions of article 3 of its treaty of 1853 with the United States and that it would wish to avoid in the future any such infringement by any arrangement which would tend to exclude possible American competition. In article 3 of the treaty the contracting parties agreed that any favor, exemption, privilege, or immunity in "the matters of commerce or navigation" granted to citizens or subjects of any other Government should extend "in identity of cases

and circumstances" to the citizens of the other contracting party. 1 Treaties, etc. (Malloy, 1910) 20, 21.

The Argentine Government considered that the contract of the Western Telegraph Company in no way affected the treaty of 1853 and that the most-favored-nation clause therein could not be invoked. The Argentine Minister of Foreign Affairs said:

The effect and the application of this clause is subordinate to the legal principle of *secundum subjectum materiam*—that is to say, according to the material. That clause being in a treaty of commerce, its application and the favors which it brings can not be cited, except in so far as they refer to commercial relations and especially regarding customs tariffs, free trade, or protection, without its influence comprehending contracts on ways of communication in general, whether by telegraph or railroad, these being considered as public services and consequently subject to special conventions.

The United States, on March 14, 1910, reserved "its right in the premises and all due assertion thereof should occasion arise". The Department in an instruction dated May 16, 1910 said:

The protection and the expedition of the needs of commerce through the medium of the quickest and cheapest means of communication, is a principle recognized as one of prime importance in modern commercial practice. Any favor or privilege limiting this principle must be held as contravening the intent of the treaty of 1853, the object of which was to promote the commerce between the United States and the Argentine Republic and to guarantee to the citizens of the United States equal privileges and facilities with those granted or to be granted by the Argentine Government to the citizens or subjects of any other Government, Nation, or State.

Supposing that the grant to the Western Telegraph Co. is to give that company the exclusive control of cable communication between the Argentine Republic and Brazil, then the right of the Central and South American Telegraph Co., an American corporation, now operating in the Argentine Republic, would be set aside, and the extension of its lines to Brazil, by cable or otherwise, for the purpose of commerce, of interest alike to citizens of the United States and of the Argentine Republic, would be made impossible.

Acting Secretary Adeo to Minister Sherrill, telegram of July 16, 1909, MS. Department of State, file 19654/1. The Argentine Minister of Foreign Affairs (De la Plaza) to Mr. Sherrill, Feb. 28, 1910; Mr. Sherrill to Señor de la Plaza, Mar. 14, 1910 (enclosures in despatch 279 from the Legation in Buenos Aires, Mar. 14, 1910); and Acting Secretary Wilson to Mr. Sherrill, no. 117, May 16, 1910: *ibid.* /9; 1910 For. Rel. 61-66.

At the request of the Commercial Pacific Cable Company the Department of State instructed the Minister to China in 1925 to offer all appropriate assistance to the company's representative in his efforts to obtain renewal

of its concession to land and operate cables in China, which was to expire in 1930. The instruction stated in part:

"Article 15 of the Treaty of July 3, 1844, between the United States and China may be regarded as having some bearing on the application of the Commercial Pacific Cable Company for a concession free from any exclusive rights of the Great Northern Telegraph Company [a Danish company], which you will observe the Commercial Pacific Cable Company now seeks. The pertinent portion of the Article mentioned reads as follows:

"Citizens of the United States engaged in the purchase or sale of goods of import or export are admitted to trade with any and all subjects of China without distinction. They shall not be subject to any new limitations nor impeded in their business by monopolies or other injurious restrictions."

"It seems that in conferring upon the Great Northern Telegraph Company exclusive privileges with respect to land telegraphs and cable facilities in China, the Chinese Government has subjected American merchants to limitations which inevitably result from the establishment of a monopoly of any kind and has imposed upon them injurious restriction[s] contrary to the spirit of the treaty.

"It is hoped that the Chinese Government may see its way to grant to the Commercial Pacific Cable Company a concession no less favorable than that enjoyed by any other communications company."

Secretary Kellogg to Minister MacMurray, no. 84, Oct. 26, 1925, MS. Department of State, file 811.7393C73/32.

An agreement for the renewal of the company's landing rights was signed in 1930, the Great Northern Telegraph Company signing a similar agreement with the Minister of Communications at Nanking at the same time. The Consul General at Shanghai (Jenkins) to the Secretary of State (Stimson), Dec. 31, 1930 (telegram), *ibid.* 811.7393C73/47.

Licenses:
conditions

In 1884 the Commercial Cable Company, an American corporation, obtained a permit from the French Government to land at Le Havre, France, a trans-Atlantic cable from the United States on condition that French Government messages be carried free. Prior to the World War of 1914-18 the French Government did not avail itself of the provision to any great extent, but after the outbreak of the war French Government messages in vast numbers were presented to it for free transmission. In 1917 the company requested the support of the Department of State in an application which it was making to the French Government for a modification of the permit to relieve it of the obligation to transmit messages free of charge and to grant it compensation for the transmission of those messages on the same terms as those granted to the Anglo-American Telegraph Company, a British company, which was said to receive half rates for French Government messages. The Department informed the Ambassador in France that it was—

of the highest importance that American owned cable lines should receive in foreign countries to which they extend treat-

ment as favorable as that granted to competing cables of other ownership and also that the conditions of the permits upon which American owned cables land and operate in a foreign country shall not be less favorable than the conditions under which cables owned in that country are permitted to land and operate in the United States.

It also stated that the application of the Commercial Cable Company for a revision of its permit was, in its view, meritorious. After several exchanges of communications between the two Governments the French Embassy in Washington forwarded to the Department, on January 31, 1919, the text of a draft rider to the contract of 1884, providing that the French Government would, provisionally, when the number of words exchanged in any year exceeded 60,000, pay on its messages 50 percent of the rates applied to ordinary private messages. This arrangement was to cease six months after the date of the decree announcing the cessation of hostilities. The Commercial Cable Company indicated to the Department of State that it would be willing to accept the rider, provided that there should be added thereto the following words:

It being understood that competing companies are granting the French Government concessions equivalent in value to such sixty thousand words free service a year, and it being further understood that the above mentioned compensation shall commence as of January 1, 1918.

The French Foreign Office in a note transmitted to the Department of State by the American Embassy on April 22, 1919, declared that—

the Government of the Republic does not hesitate to admit the point of view of the Federal Government namely, that the equality of concessions which are made by the cable companies competing with the Commercial Cable Company may not be identical but of equal value. In accordance with explanations given several times already by this Department, there could not be any difficulties in this respect.

In forwarding to the Ambassador the rider—which did not contain in the text the understanding proposed by the Commercial Cable Company—signed by the company on May 1, 1919, the Department reserved the right to consider later, should it so desire, the question whether concessions said to have been made by competing companies were equivalent in value to those made by the Commercial Cable Company and to insist on the principle of equality of treatment. The French Government also signed the rider, and on July 30, 1919 the French Foreign Office informed the Ambassador that the necessary measures had been taken to pay the Commercial Cable Com-

pany for telegrams sent by the French Government over its lines during the year 1918.

The French Foreign Office informed the American Ambassador on June 30, 1920 that the French Government had decided to maintain in force for an indeterminate period the "supplementary contract" signed by the Commercial Cable Company on May 1, 1919.

The Counselor for the Department of State (Polk) to the Ambassador to France (Sharp), no 1936, Dec. 21, 1917, MS. Department of State, file 851.73/13; the French Chargé d'Affaires (De Chambrun) to the Acting Secretary of State (Polk), Jan 31, 1919, *ibid.* /71; the Commercial Cable Co. to the Second Assistant Secretary of State (Adee), Feb. 28, 1919, *ibid.* /76; the Ambassador to France (Wallace) to the Secretary of State (Lansing), telegram 78, Apr. 22, 1919, *ibid.* /87; Mr. Adee to Mr. Sharp, no. 52, May 13, 1919, *ibid.* /89; Mr. Mackay, president of the Commercial Cable Company, to Mr. Adee, July 30, 1919, *ibid.* /90; the French Minister of Foreign Affairs (Pichon) to Mr. Wallace, July 30, 1919 (enclosure in despatch 311 from the Embassy in Paris, July 31, 1919), *ibid.* /91; Mr. Paléologue, of the French Foreign Office, to Mr. Wallace, June 30, 1920 (enclosure in despatch 1843 from the Embassy in Paris, July 2, 1920), *ibid.* /111.

In an instruction to the Ambassador in London of February 3, 1923 the Department of State said:

American cable companies have for some time been endeavoring to obtain from the Portuguese Government concessions authorizing them to land and operate cables in the Azores. The American companies are not seeking privileges which exclude British companies or which in any way interfere with the exercise by British cable companies of privileges similar to those sought by American companies. British cable companies have brought pressure to bear on the Portuguese authorities in opposition to the applications of American companies for concessions. A concession in favor of one of the American companies was submitted to the Portuguese Parliament where a condition was inserted requiring that all messages transiting the Azores for South America should be sent via the Cape Verde Islands. The other American company seeking a concession at the Azores has not yet been able to obtain favorable administrative action on its application. His Majesty's Government has been supporting the British cable companies in their opposition to the American companies and has endeavored to justify its action on the ground that the United States Government withheld licenses for the Miami-Barbados cable which connects at Barbados with the cable of the Western Telegraph Company [a British company] extending to Brazil, and on the further ground that the entry of American cable companies in the Azores would subject British companies to harmful competition. . . . The Foreign Office emphasizes that the cable of the Western Telegraph Company is the normal route for traffic from Europe to South

America, and that an arrangement whereby all unordered messages are to be sent over that route would be of no practical disadvantage to American companies. The Foreign Office represents that the interests of American cable companies would not be prejudiced by an arrangement whereby they would be permitted to carry ordered messages and would be excluded from unordered traffic, while British cable companies were permitted to carry ordered and unordered messages. If the interests of American cable companies would not be impaired under such an unequal arrangement, it is difficult to perceive that the interests of the British cable companies would be injured under an arrangement which placed both American and British companies on an equal basis and permitted both American and English companies to participate in ordered and unordered traffic. It would seem on the reasoning of the Foreign Office that British companies would have no occasion to fear harmful competition of American companies.

A note from the British Foreign Office, dated April 18, 1923, stated in part:

5. I observe, however, that your government consider "that if American cable companies are able to establish a more efficient service at better rates than their British competitors maintain, they, and those who employ cables in the transaction of their business, are entitled to the benefit of their enterprise, and should not be deprived of them by artificial restrictions, such as His Majesty's Government propose to place on American companies". This statement seems to be based on a misunderstanding, seeing that no proposal is being made to restrict the normal control by the Portuguese Telegraph Administration of the routing of unordered telegrams originating in, or in transit through, its territory.

The Department instructed the Embassy, on May 17, to include in its reply to Lord Curzon's note of April 18 a statement in the sense of the following:

... If this Government is correct in understanding that the British Government will no longer seek to interfere with the freedom of contract of the Portuguese Government and that it is entirely willing to leave the normal control of traffic to the Portuguese Government, this Government would be glad to receive a statement from His Majesty's Government to that effect.

The American Embassy in London informed the Department of State, on May 4, 1923, that the Italian Ambassador had informed Lord Curzon that Italy considered the British opposition to the landing of a cable of the Western Union Telegraph Company, an American company, to be without justification. Italy's interest in the matter

was based on the fact that an Italian cable was to connect with the Western Union line at the Azores.

A license to the Western Union Telegraph Company to land a cable in the United States to extend to the Azores, where it would connect with the Italian cable, was signed by the President on August 25, 1923.

A mutual agreement concerning traffic relations was signed on December 10, 1923 between the Western Telegraph Company Limited, the Compagnia Italiana dei Cavi Telegrafici Sottomarini, and the Western Union Telegraph Company, in which the British company agreed to raise no objection to the grant by the Portuguese Government to the Western Union Telegraph Company of the right to land at the Azores the cables in respect of which it had already applied for landing permits.

On January 24, 1924 the Portuguese Parliament approved a cable-landing license for the Western Union Telegraph Company in the Azores.

The Secretary of State (Hughes) to the Ambassador in London (Harvey), no. 790, Feb. 3, 1923, MS. Department of State, file 811.7353bW52/50; the British Secretary of State for Foreign Affairs (Curzon) to Mr. Harvey, Apr. 18, 1923 (enclosure in despatch 2273 from the Embassy in London, Apr. 20, 1923), *ibid.* /101; the Chargé d'Affaires in London (Wheeler) to the Secretary of State (Hughes), telegram 145, May 4, 1923, *ibid.* /103; Mr. Hughes to Mr. Wheeler, telegram 111, May 17, 1923, *ibid.* /101; Mr. Hughes to Mr. Wheeler, telegram 165, June 30, 1923, *ibid.* /138; the General Attorney of the Western Union Telegraph Co. (Stark) to the Assistant Secretary of State (Harrison), Dec. 22, 1923, *ibid.* /190; the Minister to Portugal (Dearing) to Mr. Hughes, no. 873, Jan. 25, 1924, *ibid.* /202; 1922 For. Rel., vol. II, pp. 359-361; 1923 For. Rel., vol. II, pp. 271-306.

For the draft agreement in respect to the use of islands and other points as relay stations signed *ad referendum* by representatives of the United States, Great Britain, and Italy at the Preliminary Conference on Electrical Communications held in Washington in 1920, see the report of the subcommittee on international cable and radio law and on cable-landing rights to the president of the Conference, MS. Department of State, file 574.D1/411a; 1920 For. Rel., vol. I, pp. 159, 161-162.

CABLES IN TIME OF WAR

§352

Article LIV of the annex to Hague Convention IV of 1907 respecting the laws and customs of war on land provides:

Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

36 Stat. 2277, 2308; 2 Treaties, etc. (Malloy, 1910) 2269, 2290.

Article 40 of the *Instructions for the Navy of the United States Governing Maritime Warfare*, issued in June 1917, contained the following provision (p. 20) :

Unless under satisfactory censorship or otherwise exempt, the following rules are established with regard to the treatment of submarine telegraph cables in time of war, irrespective of their ownership.

(a) Submarine telegraph cables between points in territory belonging to or occupied by the enemy or between such territory and territory of the United States are subject to such treatment as the necessities of war may require.

(b) Submarine telegraph cables between points in territory belonging to or occupied by the enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy or at any point outside of neutral jurisdiction, if the necessities of war require.

(c) Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity.

They must likewise be restored and compensation shall be fixed when peace is made.

(d) Submarine telegraph cables between two neutral territories shall be held inviolable and free from interruption.

The arbitral tribunal established under the special agreement of August 18, 1910 between the United States and Great Britain passed upon two claims presented by the British Government for expenses incurred by British companies in the repair of submarine telegraph cables cut by United States naval authorities during the Spanish-American War in 1898. Both claims were disallowed.

Spanish-American War

In the case of the *Eastern Extension, Australasia and China Telegraph Company, Limited*, Commodore Dewey had ordered the cutting of the Manila-Hong Kong cable and the Manila-Capiz cable. Before taking the action he had proposed that both American and Spanish authorities be permitted to transmit messages by cable to Hong Kong. When his proposal was refused by the Spanish authorities, he ordered the cutting of the Manila-Hong Kong cable. Subsequently the Spanish Government ordered the company to seal the end of the cable at Hong Kong to prevent its use by Americans. The company, acting under orders of the Spanish Government, refused to reestablish communications between Manila and Hong Kong at the request of the United States, and the Spanish Government refused a similar request by Great Britain, except on terms which the United States could not accept. Shortly thereafter the American forces cut the Manila-Capiz cable. Both cables were cut in Manila Bay and hence within enemy territorial waters.

Eastern Extension case

The British Government admitted that there was not in existence in 1898 any treaty or any rule of international law imposing on the United States the legal obligation to pay compensation for the cutting of these cables. It contended, however, that, under article 7 of the special agreement establishing the tribunal, such compensation might be awarded on the ground of equity; that the United States, having paid compensation to some other foreign cable company for similar cuttings during the same war, was legally bound to compensate the British company; and finally that, in the absence of any rule of international law on the point, it was within the power, if it were not the duty, of the tribunal to lay down such a rule. In disallowing these contentions, the tribunal stated:

Not only does the cutting of cables appear not to be prohibited by the rules of international law applicable to sea warfare, but such action may be said to be implicitly justified by that right of legitimate defence which forms the basis of the rights of any belligerent nation.

It is contended, however, that the cutting, however, legitimate, may create an obligation to compensate the neutral owner of the cable; and various instances are, or may be, given of legitimate acts which, it is said, do create such an obligation. We do not think that the instances given furnish a just analogy. In those instances, the right is not absolute but limited, and is in reality only itself acquired in consideration of the payment of compensation, and has no existence as a right apart from the obligation to make compensation. Such is the case in respect of requisition, either for the purposes of ownership or user; of expropriations, or, to take a case from maritime law, of the exercise of the right of angary.

Reference has been made to certain opinions (Dupuis, "*Revue Générale du Droit International Public*," vol. 10, p. 546) which seem to suggest that in the case of cables which connect enemy and neutral territories and are the property of neutrals, the right of a belligerent to cut ought to be exercised subject to the obligation to pay compensation, since it is not certain that the transmission of messages by the enemy over the cable has the consent of the neutral owner, against whom the belligerent is acting, and who may in fact be innocent. In such a case, it is suggested, the neutral owner of a cable is in the same position as the neutral owner of cargo which may or may not be used for warlike purposes and against whom there is no evidence of intention to assist the enemy, and who, if such cargo be seized, must be paid for it. In the first place it is a matter of controversy whether or not such rule as to the neutral owner of such cargo in fact exists; secondly, such a rule, if it does exist, is in practice inapplicable to submarine cables, having regard to their peculiar character; thirdly, the facts postulated for the application of the suggested rule do not exist in this case.

It has been said (see the opinion of Sir Robert T. Reid and Mr. Henry Sutton, British Memorial, pp. 12 and 13) that if the cables had been the ordinary property of neutrals, that fact, under the ordinary rule, would have been fatal to this claim, but that the ordinary rule does not apply to such property as these cables, which are of an international character. But it seems difficult to concede such international character to these cables which were under the absolute control and authority of a particular State. If they afforded communication between different countries and nations and, in that sense, were international, they were not more international than a packet boat or any other ship trading between various countries.

According to the terms of the concessions, these cables possessed the character of Spanish works of public utility, and if, as private ordinary property, they were subject to destruction without compensation in case of necessity of war, *à fortiori* they were so as an enemy public utility undertaking.

Nielsen's Report (1926) 40, 73, 76-77, 78.

On the same day that it decided the above case, the tribunal also rendered a decision disallowing a claim advanced on behalf of the Cuba Submarine Telegraph Company, Limited, for expenses incurred in restoring submarine cables connecting various places on the island of Cuba, which were also cut by United States naval authorities in 1898. These cuttings likewise took place within enemy territorial waters. The tribunal called attention to various elements of control and restriction which made apparent the company's character as a Spanish public service having a military and strategic interest, and concluded:

Cuba
cable
case

In these circumstances the right of the United States to take measures of admittedly legitimate defense against these means of enemy communication was fully justified; if some compensation was due to the company for the damage done to the cable, it was for the Spanish Government to make it, always supposing that such compensation had not been already considered in the terms agreed upon under the concessions. In our opinion, not only is there no ground of equity upon which an award should be made against the United States, but equity appears to us to be on the side of the United States in their refusal to pay the damages claimed.

Nielsen's Report (1926) 82, 84.

For a list of cables cut or destroyed in time of war prior to the World War of 1914-18, see II Fauchille, *Traité de droit international public* (1921), par. no. 1321¹, pp. 417-418.

In response to an inquiry from the Consul at St. Pierre whether the Department of State would authorize the protection as neutral property of telegraph cables leased by the Western Union Telegraph Company at that place, the Department replied that, under generally accepted principles of international law, submarine telegraphic cables between the territory of a belligerent and a neutral might be cut by belligerents

outside of the territorial waters of the neutral in the course of military or naval operations, but that, if the cables were not used to furnish military information or for other unneutral purposes, it hoped that the belligerents would not cut them.

Secretary Bryan to Consul Kemp, telegram of Aug. 11, 1914, MS. Department of State, file 763.72/143; 1914 For. Rel. Supp. 503.

Peace
Conference,
1919

A summary of the report of the Commission on Enemy Submarine Cables, appointed pursuant to a resolution adopted by the Supreme War Council on March 7, 1919, was presented on March 24 at a meeting of the Council of Ten by Henri Fromageot, of France. (Other members of the Commission were James Brown Scott, of the United States; A. Pearce Higgins, of Great Britain; Gustavo Tosti, of Italy; and Yamakawa, of Japan.) The following replies to the questions which had been submitted to it were made:

(1) The Committee is unanimous in thinking that military necessity is a justification for the cutting of enemy cables.

(2) On the question as to whether the enemy cables can or cannot be the subject of capture or prize the Delegates of the British Empire, France and Japan think that the capture and confiscation of enemy cables are legally justified by the general principle of the right of capture of enemy property at sea. The delegates of the United States and of Italy consider, on the other hand, that in the present state of international law this opinion is not well founded, the property in enemy cables cannot be assimilated to property subject to capture at sea.

(3) In these circumstances the Committee is unanimous in considering that in the absence of a special rule, recognising the right of confiscation of enemy submarine cables, the treaty of peace must decide the disposal of these cables.

On the third question. ["In the event that the cut or captured cable of an enemy is landed on the territory of another nation, what right and authority does such nation possess under contracts or permits granted to the enemy to cancel the same or to control the use of the cable?"] The Committee is unanimous in considering that the answer depends upon the terms of the contracts entered into between the owner of the cable and the third Power on whose territory such cable is landed, and that, in all cases, these contracts are, as regards the belligerents who have cut or seized the cable, a *res inter alios acta*.

MS. Department of State, file Paris Peace Conference 180.03101/53, /64, and *ibid.* Paris Peace Conference 181.22202/1.

For the deliberations of the Commission on Enemy Submarine Cables on the questions of international law relating to the capture and disposal of German submarine cables, see summaries of meetings of Mar. 11 and 16, 1919, MS. Department of State, file Paris Peace Conference 181.22201/1, /2.

See also the minutes of the meeting of the Foreign Ministers held on Apr. 30, 1919 and of the meetings of the Council of Ten held on May 1 and 2, 1919 for background of the origin of annex VII to part VIII of the Treaty

of Versailles, dealing with submarine cables. MS. Department of State, file Paris Peace Conference 180.03201/10; *ibid.* Paris Peace Conference 180.03101/66, /67.

On May 3, 1919 representatives of the Principal Allied and Associated Powers in Paris adopted a protocol regarding the disposition of German cables, reading:

. . . Such of the above mentioned cables as are now in use shall continue to be worked in the conditions at present existing but such working shall not prejudice the right of the Principal Allied and Associated Powers to decide the future status of these cables in such way as they may think fit.

Protocol
of May 3,
1919

. . . The Principal Allied and Associated Powers may make such arrangements as they may think fit for bringing into operation any of the said cables which are not at present in use.

. . . The Principal Allied and Associated Powers shall, as soon as possible, arrange for the convoking of an international congress to consider all international aspects of communication by land [telegraphs], cables, or wireless telegraphy, and to make recommendations to the Principal Allied and Associated Powers with a view to providing the entire world with adequate facilities of this nature on a fair and equitable basis.

The Ambassador in France (Wallace) to the Secretary of State (Colby), telegram 1159, May 15, 1920, MS. Department of State, file 862.01/12; 1920 For. Rel., vol. I, pp. 121-122.

It was provided in annex VII to part VIII of the Treaty of Versailles:

Germany renounces on her own behalf and on behalf of her nationals in favour of the Principal Allied and Associated Powers all rights, titles or privileges of whatever nature in the submarine cables set out below, or in any portions thereof.

Versailles
Treaty

The value of the above mentioned cables or portions thereof in so far as they are privately owned, calculated on the basis of the original cost less a suitable allowance for depreciation, shall be credited to Germany in the reparation account.

8 Treaties, etc. (Redmond, 1923) 3329, 3438.

For a map showing the location of the cables renounced by Germany in the Treaty of Versailles, see International Conciliation, no. 198 (May 1924), p. 132.

On July 26, 1920 the Reparation Commission decided that "all questions of distribution and allocation of cables were within the competence of the various Governments concerned", the Commission reserving all rights with regard to the valuation of the cables in question. MS. Department of State, file 862.73/35. See opinion of the Legal Service of the Reparation Commission as to the request of the Dutch Government relating to certain telegraphic cables, no. 44, MS. Department of State, file 862.73/35.

The delegates to the Preliminary International Conference on Electrical Communications held in Washington in 1920 unanimously adopted a resolution reading as follows:

It is the consensus of opinion of all the delegations that it is most necessary, both from the standpoint of expediency and justice, that a definite agreement be reached for terminating at a very early date the present status of the ex-German cables and for an equitable distribution of ownership and operation thereof. In view of the fact that some of the delegates consider it necessary to consult their governments, it is agreed that the technical work of the Conference shall be temporarily adjourned. It is agreed, however, that the Conference shall continue its deliberations regarding the division and operation of the ex-German cables and that the delegates will recommend to their respective governments that the ambassadors of the respective countries shall as far as possible temporarily substitute those delegates who return to consult in person with their governments.

On and after January 1, 1921, and pending termination of the present status of operation under the protocol of May 3, 1919, the various ex-German cables shall be operated as at present, but for the financial account of the five powers, provided, however, that in accounting for such operation the income after deducting operating expenses shall be apportioned in accordance with the final disposition to be made of such cables.

It is furthermore agreed that the delegates will recommend at once to their respective governments that if an agreement is not reached by February 15th next for the final division of the cables, the Conference will immediately proceed to arrange an agreement for a new *modus vivendi*, to become operative on or before March 15, 1921.

It is understood, that the delegates will obtain and report at the earliest possible date the decisions of their governments on such recommendations.

Department of State, Mimeographed Press Release, Dec. 14, 1920; 1920 For. Rel., vol. I, pp. 147, 148.

"... the negotiations for a settlement of the questions connected with the distribution of the ex-German cables, have resulted in a tentative allocation of the ex-German cables in the Pacific Ocean as follows:

"Yap-Menado cable allocated to Holland.

"Yap-Shanghai cable allocated to Japan.

"Yap-Guam cable allocated to the United States.

"At a meeting of the Preliminary Conference on Communications on February 23, 1922, the representatives of the Principal Allied and Associated Powers, with the exception of the Italian representative, expressed the approval of their governments of the proposed settlement. The Japanese representative stated that the interests of Japan in the ex-German cables will be fully satisfied by the arrangements that it is proposed to make for the distribution of the ex-German cables in the Pacific. The representative of Italy while agreeing in principle declined to agree finally

to the proposed distribution of the ex-German cables in the Pacific Ocean until an arrangement had been reached for the distribution of the ex-German cables in the Atlantic Ocean.

"... by paragraph 3 of the tentative arrangement for the allocation of the ex-German cables in the Pacific it is provided that the Yap-Menado cable shall be assigned to and owned by the Netherlands 'in full and final satisfaction of all claims of the Netherlands Government and its nationals respecting their interests in the German Netherland Telegraph Company'."

The Secretary of State (Hughes) to Roland W. Boyden, member of the Unofficial Delegation of the United States Reparation Commission, May 29, 1922, MS. Department of State, file 862.73/75. And see Minister of the Netherlands (De Beaufort) to Mr. Hughes, Feb. 25, 1922, and enclosure (copy of the memorandum containing the tentative draft arrangement), *ibid.* 862.73/41.

The convention of Feb. 11, 1922 between the United States and Japan, regarding the rights of the two Governments and their nationals in former German islands in the Pacific Ocean north of the equator and in particular the Island of Yap, contains provision in article III that the United States and its nationals "shall have free access to the Island of Yap on a footing of entire equality with Japan or any other nation and their respective nationals in all that relates to the landing and operation of the existing Yap-Guam cable or of any cable which may hereafter be laid or operated by the United States or by its nationals connecting with the Island of Yap". Article IV specifies certain rights, privileges, and exemptions which are to be enjoyed by the United States and its nationals in connection with the rights embraced in article III. 3 Treaties, etc. (Redmond, 1923) 2723, 2726-2727. For correspondence concerning the problems underlying this convention, see 1921 For. Rel., vol. II, pp. 263-307.

On Mar. 6, 1922 Henry P. Fletcher, Under Secretary of State of the United States, as chairman of subcommittee 1 of the Preliminary International Conference on Electrical Communications held in Washington in 1920, submitted a tentative plan for the allocation of the ex-German cables. The plan was based upon the principle of "approximately equal values", as suggested by the British Ambassador. Under it the total value of all the cables to be allocated to the United States, Great Britain, France, and Italy (which did not include the Yap-Shanghai and Yap-Menado cables) was ascertained, and each country was allocated a one-fourth share of the total value in cables or in money. The Reparation Commission's valuations were to be adopted where possible as the only valuation available.

The plan was referred to the respective Governments. The Italian Government immediately accepted it in principle, with certain reservations; the United States was prepared to support it; the British Government expressed its assent, with a number of reservations; the French Government did not accept it. France objected to the valuations placed upon the cables and stated that the comparative "economic importance and utility of the cables" should be considered; that the "distribution of the cables forms an aggregate from which the Pacific cables cannot be separated"; and that it desired to retain possession of the Brest-Azores-New York cable, which under the plan was to be allocated to the United States. It suggested that the cables be allocated upon a different basis. In this state of

affairs, a plan to reconvene subcommittee 1 in Nov. 1925, undertaken by Secretary Kellogg, to which France objected, was not carried through.

MS. Department of State, file 574.D1/532, enclosure 1 (copy of tentative plan presented by Mr. Fletcher); the Italian Chargé d'Affaires (Sabetta) to the Secretary of State (Hughes), June 20, 1922, *ibid.*, enclosure 3; the British Chargé d'Affaires (Chilton) to Mr. Hughes, Oct. 3, 1923, *ibid.*/537; the French Chargé d'Affaires (De Laboulaye) to Mr. Hughes, Sept. 10, 1923, enclosing an *aide-mémoire* from the French Embassy, *ibid.*/538; the French Ambassador (Daeschner) to the Secretary of State (Kellogg), Nov. 3, 1925, *ibid.*/590; memoranda of the Assistant Secretary of State (Harrison), June 24 and Nov. 16, 1925, *ibid.*/575, /591.

For material with reference to the general problem of allocating the former German cables, see 1919 For. Rel., vol. II, pp. 504-527; 1920 For. Rel., vol. I, pp. 110-127, 132 *et seq.*; 1921 For. Rel., vol. II, pp. 307-313. See also 1922 For. Rel., vol. II, p. 368.

RADIO

§353

The Federal Communications Act of June 19, 1934 (48 Stat. 1064; 47 U.S.C. §151 *et seq.*) created the Federal Communications Commission and laid down rules for the purpose of "regulating interstate and foreign commerce in communication by wire and radio". Section 301 of the act states:

Control
by U.S.

It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission.

48 Stat. 1081; 47 U.S.C. §301. To like effect, see the Radio Act of Feb. 23, 1927 (44 Stat. 1162), superseded by the 1934 act.

The Federal Communications Act of 1934 prohibits the granting to, holding by, or transferring of a radio-station license to any alien or representative of an alien, to any foreign government or representative thereof, or to any corporation of which any officer or director is an alien or of which more than one fifth of the capital stock is owned by aliens. 48 Stat. 1086; 47 U.S.C. §310. An analogous provision was contained in section 12 of the Radio Act of 1927. 44 Stat. 1162, 1167. The Radio Communication Act of 1912 limited the granting of licenses to citizens. 37 Stat. 302, 303.

Section 325(b) of the Communications Act of June 19, 1934 provides:

"No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor." 48 Stat. 1091; 47 U. S. C. § 325.

Acting Attorney General Beck stated on Aug. 18, 1902:

"The power of the United States, either alone or in cooperation with other countries, to impose conditions upon the operation of any wireless telegraph system which conveys messages to or from the United States is perfectly clear." 24 Op. Att. Gen. (1903) 100, 101.

Acting Attorney General Donovan wrote on July 8, 1926:

"There is no doubt whatever that radio communication is a proper subject for Federal regulation under the commerce clause of the Constitution. . . . And it may be noticed in passing that even purely intrastate transmission of radio waves may fall within the scope of Federal power when it disturbs the air in such a manner as to interfere with interstate communication." 85 Op. Att. Gen. (1929) 126, 128.

The arrangement, signed on behalf of the United States, Canada, Cuba, and Newfoundland on February 26 and 28, 1929, with respect to the assignment of high frequencies to radio stations, declared:

(1) The sovereign right of all nations to the use of every radio channel is recognized. Sovereignty

Nevertheless, until technical development progresses to the stage where radio interference can be eliminated, it is agreed that special administrative arrangements are essential in order to promote standardization and to minimize radio interference.

4 Treaties, etc. (Trenwith, 1938) 4787.

"It is doubtless the right of a State to control the passage of Hertzian waves through the air space over its territory." I Hyde, *International Law*, etc. (1922) 331.

"The principle of exclusive sovereignty in the air space for the subjacent State, which has received general approval in connection with aerial navigation, enables that State to prohibit the disturbance of the air space over its territory by means of Herzian [*sic*] waves caused for the purpose of wireless communication and emanating from a foreign force. Neither the Washington Convention of November 25, 1927, nor the General Radio communication Regulations attached to the International Telecommunication Convention of Madrid of December 9, 1932, nor the European Broadcasting Convention of Lucerne of June 19, 1933, derogate from that principle. But these conventions mark the beginning of attempts to introduce a substantial element of legal regulation in a domain of human activity which by its very nature transcends the borders of the territorial State. The last-named Convention, in which the Parties have undertaken definite obligations with regard to the operation and installation of broadcasting stations, is an important step in this direction. It is possible that the growing number of treaties in this field will contribute to the more general acceptance of the principle prohibiting the abuse of rights, both with regard to the emission and passage of waves." I Oppenheim's *International Law* (5th ed., by Lauterpacht, 1937) 413.

Cf. the resolutions of the Institute of International Law concerning the international regulation of wireless telegraphy, adopted at Ghent in 1906 (21 *Annuaire de l'Institut de Droit International* [1907] 327), and concerning radiotelegraphic communications, adopted at Lausanne in 1927 (33 *idem* (1927), vol. III, p. 342).

General radio
conventions:
Berlin, 1906

The United States has become a party to the general multilateral conventions concerning radio, the first of which was the international wireless telegraph convention drawn up at a conference in Berlin and signed November 3, 1906. The Senate did not give its advice and consent to ratification until April 3, 1912; the President ratified the convention on April 22, 1912; and the American ratification was deposited on May 17, 1912.

3 Treaties, etc. (Redmond, 1923) 2889.

Regarding the work of the Berlin Conference of 1906, see the report of the Ambassador to Germany (Tower), head of the American Delegation, to the Secretary of State (Root), Nov. 17, 1906, MS. Department of State, file 1149/13; 1906 For. Rel., pt. II, pp. 1515-1519; see also John D. Tomlinson, *International Control of Radiocommunications* (Geneva, 1938) 17-27. An earlier conference of 1903 in Berlin had drafted a protocol but had failed to reach agreement on the obligation of coastal stations to exchange telegrams with ship stations without regard to the system of wireless telegraphy employed. *Ibid.* 14-17. See also *Conférence Préliminaire concernant la Télégraphie sans Fil* (Berlin, 1903).

The Berlin Conference drew up service regulations, an additional agreement concerning communications between ships, and a final protocol including reservations to the convention and service regulations, in addition to the convention. These instruments were also signed and ratified by the United States. 3 Treaties, etc. (Redmond, 1923) 2896, 2898, 2902.

The Berlin convention was generally concerned with communications at sea, both between ship stations and coastal stations and from ship to ship. The principal issue, that of intercommunication without regard to the system employed, remained. The convention provided that coastal and ship stations were "bound to exchange wireless telegrams reciprocally without distinction of the wireless telegraph system adopted by such stations" (art. 3). The final protocol provided that each government could reserve the right to exempt certain stations from this obligation, on condition that one or more coastal stations on its territory be subject thereto. Eighteen of the twenty-seven signatories declared that they did not reserve this right. The supplementary agreement extending to ship-to-ship communication the obligation of exchange of messages without regard to system was signed by twenty-one countries. The convention and service regulations laid down rules concerning minimum technical standards for operators and apparatus, specified wavelengths for certain services, attempted to reduce interference, dealt with certain rate questions, and dealt with matters concerning the acceptance and transmission of radiotelegrams. Provisions of the international telegraph convention of St. Petersburg of July 10/22, 1875 and the international telegraph regulations were made applicable to wireless telegraphs. The International Telegraph Bureau was charged with the duties of collecting and publishing information and performing certain administrative work; additional expenses for wireless telegraph functions were to be handled separately from its other expenses.

London, 1912

The London Wireless Telegraph Conference of 1912 adopted a radio-telegraph convention, final protocol, and service regulations. Their provisions were made applicable to all stations open to public service

between ship and shore and to all ship stations whether or not open to public service. Exchange of messages regardless of system of radio was made obligatory in communication between ships as well as between ship and shore; but this was not to prevent the eventual employment of a radio system incapable of intercommunication because of its specific nature. The parties agreed to connect coastal stations with the telegraph system or to take other measures to insure rapid exchange of messages between them. It was declared that the working of radio stations should be organized so far as possible in such manner as not to disturb the service of other stations. With the *Titanic* disaster in mind, it was agreed that radio stations should be bound to give absolute priority to distress calls, to answer them, and to take requisite action with respect to them. Various provisions of the Berlin convention were incorporated with little change.

3 Treaties, etc. (Redmond, 1923) 3048; Report of the American Delegation to Secretary Knox, Oct. 30, 1912, MS. Department of State, file 574.C1/75; Proceedings of the International Radiotelegraph Conference of London, 1912, *ibid.* /77½.

At the International Radiotelegraph Conference held in London in 1912 the Delegation of the United States invited the Conference to meet next in Washington. The tentative date was set for 1917, but because of the war and other conditions it was postponed until October 4, 1927. The Washington Conference drew up an international radiotelegraph convention, with annexed general regulations and annexed supplementary regulations.

Washington
Conference,
1927

Report on the International Radiotelegraph Conference, and appendixes, transmitted by the Chairman of the American Delegation (Hoover) to the Secretary of State (Kellogg), Dec. 11, 1927, MS. Department of State, file 574.D7/1043. See also Stewart, "The International Radiotelegraph Conference of Washington", in 22 A.J.I.L. (1928) 28; Bureau International de l'Union Télégraphique, *Documents de la Conférence Radiotélégraphique Internationale de Washington 1927* (Bern, 1928), vols. I and II.

For discussion of the relation of the radiotelegraph convention and regulations to the telegraph convention of 1875 (57 League of Nations Treaty Series 213) and regulations, see John D. Tomlinson, *International Control of Radiocommunications* (1938) 62 *et seq.*

For a history of the International Telegraphic Union, to which the United States was not a party, and brief descriptions of the work of the International Telegraphic Bureau at Bern, which was established by the convention signed at Vienna July 21, 1868 (59 Br. & For. St. Paps. [1874] 322, 335, 363) and which began its operations Jan. 1, 1869, see Reinsch, "International Unions and Their Administration", in 1 A.J.I.L. (1907) 579, 582-585; Report of the American Delegates to the Tenth Conference of the International Telegraphic Union, Lisbon, 1908, H. Doc. 1205, 60th Cong., 2d sess., pp. 2-4; Keith Clark, *International Communications* (1931) 90-122; Laurence F. Schmeckebier, *International Organizations in Which the United States Participates* (1935) 258.

Washington
radio-
telegraph
convention

By the Washington radiotelegraph convention (signed November 25, 1927) the parties undertook to apply the convention to all radio-communication stations which were established or operated by them and which were open to the international service of public correspondence. They also agreed to apply its provisions to special services covered by the regulations: radiobeacons, radio compass, time signals, notices to navigators, standard waves, etc. They further undertook to adopt, or propose to their legislatures, measures necessary to impose the observance of the convention and regulations upon individuals and private enterprises authorized to establish and operate radio stations in international service, whether or not open to public correspondence. The convention recognized the right of two contracting governments to organize radiocommunications between themselves, provided that they conformed to the provisions of the convention and regulations.

Provision was made for obligatory intercommunication regardless of system in the mobile service, each Government reserving its freedom concerning fixed stations in this respect. Each Government agreed to take the measures necessary for the making of connections between land stations on its territory open to international public correspondence and the general land-communication system, or at least to take steps to assure rapid and direct exchanges between them.

The convention provided for the operation of stations, so far as practicable, in the best manner known to practice and with a minimum of interference with the radio services of other countries.

4 Treaties, etc. (Trenwith, 1938) 5031.

General provisions are included in the Convention which provide for the secrecy of messages, intercommunication between coastal and ship stations, the mutual exchange of information necessary to facilitate international radio communication, the establishment of an International Consulting Committee on Radio Communication, the allocation of blocks of call letters to countries and the settlement of disputes by arbitration.

Report on the International Radiotelegraph Conference, app. 43, transmitted by the Chairman of the American Delegation (Hoover) to the Secretary of State (Kellogg), Dec. 11, 1927, MS. Department of State, file 574.D7/1043.

The regulations deal, *inter alia*, with definitions and standards, operator's certificates, procedure for establishing and carrying on communications in the mobile services, routing of radiotelegrams from mobile to land stations, clearing of accounts in the mobile service, operation of the special services, standard abbreviations, and similar technical matters. 4 Treaties, etc. (Trenwith, 1938) 5039.

An allocation of frequency or wave length bands to various radio services has been drawn up. This includes allocations for roadcasting, international point-to-point communication, mo-

bile service (including ships, aircraft and land stations which communicate with them), and amateurs. The channels from 10 to 100 kilocycles have been set apart chiefly for long distance transoceanic service; the channels from 100 to 500 kilocycles have been set aside primarily for ship to shore and aircraft service; the channels from 500 to 1500 kilocycles have been set aside for broadcasting; the very great number of channels from 1500 to 60,000 kilocycles have been apportioned into 40 different bands and divided between mobile service, communication between fixed stations, broadcasting, and amateur stations.

There have been drawn up regulations for each of the different services which have been assigned to specific frequency bands. The point to point radio telegraph services have been defined in such a fashion as to permit constantly extended use in the commercial world. In the mobile service band—mostly ship communications—the regulations have been clarified and defined in such a fashion as will result in greater safety of life and property at sea. These regulations set forth detailed and stringent rules of practice for communications between ships and shore. They facilitate the making of contacts between ships. They give full place to the radiobeacon and radiocompass. They place distress communications in priority over the world's other communications.

The broadcasting band has been specified and defined for the whole world in such a fashion that there will be less conflict and interference,—a direct contribution to every owner of a receiving set. The area of higher frequencies—that is, the shorter wave lengths,—is the field in which it seems likely that the largest development of the art will take place, and this region has been so divided as to give stimulation to the many applications which are now tentatively before the world.

Aside from the broad provisions for the orderly handling of traffic, detailed regulations to this end have been developed through the requirements as to technical operation of stations, which should result in lessening the amount of present interference, and above all, assure development of the art itself.

Restriction has been put on the use of transmitting sets which emit damped waves, the familiar example being the spark set, the interference from which is so fatal to the broadcast listener. The Regulations provide that upon adoption, no more damped wave sets are to be installed at fixed or land stations; that after 12 months no more such sets are to be installed on ships; and that, within a definite period of years, the power of existing damped wave stations shall be substantially reduced, thereby greatly minimizing interference.

The Convention, for the first time has recognized the amateur as an important element in radio communication and has conferred upon him, by international treaty, certain definite frequency bands. The effect of these arrangements for the amateurs has been agreed by their representatives as increasing and assuring their opportunities to make contact with their companions overseas.

Report on the International Radiotelegraph Conference, app. 43, transmitted by the Chairman of the American Delegation (Hoover) to the Secretary of State (Kellogg), Dec. 11, 1927, MS. Department of State, file 574.D7/1043.

" . . . The principle of allocation of frequencies to services, not countries, was followed." Stewart, "The International Radiotelegraph Conference of Washington", in 22 A.J.I.L. (1928) 28, 48.

C.C.I.R.

The International Technical Consulting Committee on Radio Communication (C.C.I.R.) was established under article 17 of the Washington radiotelegraph convention of November 25, 1927.

4 Treaties, etc. (Trenwith, 1933) 5031, 5035. See *Report of the Delegation of the United States of America to the Fourth Meeting of the International Radio Consulting Committee (C.C.I.R.)*, Bucharest, May 21-June 8, 1937 (Department of State Conference Ser. 41, 1939) 23; see also Department of State, Treaty Information Bulletin, no. 1 (Oct. 1929), pp. 28-29; *ibid.*, no. 19 (Apr. 1931), pp. 16-18; *ibid.*, no. 22 (July 1931), pp. 26-30; *ibid.*, no. 60 (Sept. 1934), p. 14; *ibid.*, no. 85 (Oct. 1936), p. 20; *ibid.*, no. 92 (May 1937), p. 25; *ibid.*, no. 95 (Aug. 1937), pp. 27-30.

For a discussion of the background and functioning of the C.C.I.R., see Stewart, "The International Technical Consulting Committee on Radio Communication", in 25 A.J.I.L. (1931) 684; see also Schmeckeblie, *International Organizations in Which the United States Participates* (1935) 331-335.

Madrid Conference, 1932

The International Radiotelegraph Conference which met in Madrid in 1932 adopted an international telecommunication convention, general radio regulations and a final protocol thereto, additional radio regulations, telegraph regulations and protocol, telephone regulations, and a European radio protocol. Only the telecommunication convention and the general radio regulations and protocol were signed and ratified by the United States.

4 Treaties, etc. (Trenwith, 1938) 5379; *Report of the Chairman of the American Delegation to the International Radiotelegraph Conference, Madrid 1932* (Department of State Conference Ser. 15, 1934); Department of State, Treaty Information Bulletin, no. 40 (Jan. 1933), pp. 31-32.

International telecommunication convention, 1932

The following summary of the international telecommunication convention concluded at Madrid in 1932 is contained in the report of the Chairman of the American Delegation to the Madrid Conference:

The International Telegraph Conference of Paris, 1925, and the International Radio Conference of Washington, 1927, passed resolutions looking toward the eventual amalgamation of the International Telegraph Convention and the International Radio Convention. . . .

The Convention signed by your delegation at Madrid contains only statements of general principle, most of which are applicable alike to radio, telegraphy, and telephony. Throughout the negotiations your delegation kept constantly in mind the factors

which had kept the United States from becoming a party to the International Telegraph Convention; and while the new Convention contains provisions applicable to telegraphy, the insistence of your delegation brought about the elimination of all of the objectionable features which had kept the United States from accepting the International Telegraph Convention. The statement of general principles in the Convention is supplemented by details incorporated in separate sets of regulations dealing with radio, telegraphy, and telephony, respectively. For the most part the Convention articles relate to all three services alike. Because of its peculiar nature, however, certain articles relating only to radio were incorporated in the Convention at the insistence of a number of delegations, including that of the United States.

The Conference adopted the term "telecommunication" as the one best adapted to include all the services covered by the Convention and Regulations.

Article 1 of the Convention creates the International Telecommunication Union which replaces the International Telegraph Union. The new Union combines radio and telegraph activities which have been closely associated in the past.

Article 2 relating to the regulations annexed to the convention follows the precedent set by the International Radio Convention of Washington. Four sets of regulations are provided—one for telegraphy, one for telephony, and two for radio (General Regulations and Supplementary Regulations, as in the case of the Washington Convention). A government accepting the Convention must accept at least one set of regulations under the condition that the Supplementary Radio Regulations may be accepted only in conjunction with the General Radio Regulations. The regulations may be accepted only by governments which accept the Convention.

The final paragraph of article 2 states that a government is bound by the provisions of the Convention only with respect to the services, the regulations concerning which it has accepted. . . . As your delegation signed only the Convention and the General Radio Regulations, the Government of the United States will have obligations only with respect to radio and not with respect to telegraphy and telephony.

Article 8 . . . abrogates as among the contracting governments the preceding conventions.

Article 30 provides for priority in the transmission of State telegrams and radiotelegrams unless the sender renounces this right of priority. It is modeled after an article in the Telegraph Convention which had no counterpart in the Radio Convention. Your delegation opposed the insertion of the article in the Convention but accepted it as a compromise with certain other delegations who insisted upon establishing in the Convention a well-defined order of priorities extending to all telegrams. It is be-

lieved that the provisions of article 30 will not vary the present practice.

Report of the Chairman of the American Delegation to the International Radiotelegraph Conference, Madrid 1932 (Department of State Conference Ser. 15, 1934) 11-14.

The annex to the international telecommunication convention signed at Madrid, Dec. 9, 1932, defined "telecommunication" as "Any telegraph or telephone communication of signs, signals, writings, images, and sounds of any nature, by wire, radio, or other systems or processes of electric or visual (semaphore) signalling." 4 *Treaties, etc.* (Trenwith, 1938) 5379, 5391.

"The Bureau of the International Telecommunication Union, was established pursuant to the provisions of article 17 of the telecommunication convention signed at Madrid on December 9, 1932 and effective in 1934 (49 Stat. 2391). It took the place of the International Bureau of the Telegraph Union, which was established in 1869 under the provisions of article LXI of the international telegraph convention signed at Vienna on July 21, 1868 (*British and Foreign State Papers*, vol. LIX, p. 322).

"Under article 17 of the Madrid convention, the Bureau of the Union is charged with:

- "(1) Work preparatory to and following conferences, in which it is represented in an advisory capacity;
- "(2) Providing, in cooperation with the organizing administration involved, the secretariat of meetings of committees appointed by the Union or placed under the auspices of the latter;
- "(3) Issuing such publications as will be found generally useful between conferences;
- "(4) Publishing periodically a journal of information and documentation concerning telecommunications;
- "(5) Holding itself at all times at the disposal of the contracting governments to furnish them with such opinions and information as they may need on questions concerning international telecommunications;
- "(6) Preparing an annual report on its activities to be communicated to all the members of the Union.

"The foregoing functions of the Bureau are in addition to the work and operations provided for by the various articles of the convention and the regulations annexed thereto.

"The Bureau is placed under the supervision of the Swiss Government, which regulates its organization, supervises its finances, makes the necessary advances, and audits the annual accounts.

"For the fiscal year ending June 30, 1939 the sum of \$5,790 was appropriated by Congress to defray the cost of American participation in the activities of the radio section of the Bureau (52 Stat. 253)."

American Delegations to International Conferences, etc. (Department of State Conference Ser. 45) 130-137.

"The Bureau is divided into two sections, one dealing with telephone and telegraph service and the other with radio service. Each section has a separate budget, and the adhering states contribute to the expenses of one or both, depending upon their adherence to the separate regulations. The United States has adhered only to the radio regulations and there-

fore contributes only to the expenses of the radio section of the Bureau." *Ibid.* 136, n. 2.

This article [article 7 of the general radio regulations adopted in 1932 at Madrid] maintains the principle of the right of nations to make assignments of any frequency on the condition that no interference results. However, if frequencies to be used are capable of causing interference, the nations agree to assign frequencies to services in accordance with the table of allocations. This language was made definite and the allocation table is no longer merely a guide.

General radio
regulations,
1932

During the past five years some nations have not made assignments entirely in accordance with the allocation table even though interference was caused. After the service was established it was difficult to make adjustments. In order that all administrations may know when a nation intends, under the general provision of no interference to regularly authorized services of other nations, to assign a frequency to a service not authorized for that service, provision is made for the notification of all nations of such fact prior to the entering into service of the station in question. Thus an opportunity is afforded for protest and adjustment or arbitration before the station is actually put into service and causes interference.

The principle of regional agreements which has been used extensively in North America was more definitely recognized. The governments of any region may by regional agreement under article 13 of the Convention agree among themselves as to the assignment of frequencies or bands of frequencies which will not cause interference to the nations not included in the region. The same rules apply to notification of all nations as when single nations make assignments. Any assignments to stations which are not in accordance with the allocation table must be notified to other nations not in the region and must be made in such a way as not to cause interference to all the services regularly authorized by the regulations. All governments will thus be informed as to regional agreements and opportunity will be provided for protests and adjustments where necessary.

The European governments agree that frequencies to broadcasting stations outside the regularly authorized bands shall not be assigned except by mutual agreement among all the nations of the European region. A special procedure for notification and approval was set up for this region.

The United States had proposed a change in the allocation table to make better use of the frequencies assigned to the mobile services above 4,000 kc. This principle was expressed in the proposals of the United States in the form of changes in the allocation of frequencies to services. There was considerable opposition to changing the allocation table but much support for the principle of better organization of the use of frequencies by the mobile services. In order to accomplish this, rules were adopted to be followed in order to effect this organization. These rules go into considerable detail as to the bands of frequencies rec-

ommended to be assigned to ship stations having stabilized transmitters and to those having unstabilized transmitters as well as the relation of coast-station and ship-station assignments. This plan is in principle the same as one which has been followed in the United States for about a year and which experience has shown to be very satisfactory. The general adoption of this plan by the principal maritime interests will undoubtedly result in a reduction in interference in the use of high frequencies in the mobile service. Since a relatively small number of ships are now equipped with high frequency and the operating procedure has not been fully developed, this organization should be very useful in all future assignments by the governments and result in a more economical use of frequencies. While the language is not as mandatory as the United States would desire, the principle is recognized and future developments will make possible more definite restrictions if found necessary.

Report of the Chairman of the American Delegation to the International Radiotelegraph Conference, Madrid 1932 (Department of State Conference Ser. 15, 1934) 18-19 With reference to the allocation of frequencies to services, see *ibid.* 19-22

"The principle was maintained [in 1932 at Madrid] to provide a set of supplementary regulations to contain matters of management which certain administrations, including the United States, would not sign." *Ibid.* 23.

Telegraph regulations

In contrast with that of the Radio Conference, the work of the Telegraph Conference related primarily to matters of the operation of the telegraph and telephone services. Several American communication companies were represented and participated in the discussions of operating detail. While numerous changes were made in the International Telegraph Regulations, there were few points which were of general importance. The representatives of the United States participated briefly in the discussion of two points of a general character, but did not take part in the voting as they had no intention of signing the Telegraph or Telephone Regulations.

The principal proposals of general interest were those relating to code language, to the notification of equivalents for the gold franc, which is used as the unit for the composition of rates and the establishment of international accounts, and to establishment of a minimum word count.

Ibid. 23.

Telephone regulations

The Telephone Regulations as adopted provide that their application is limited to the European telephone service. . . . Since the American companies are not affected by them and our delegation does not sign these regulations, it is deemed unnecessary to discuss them in detail.

Ibid. 25.

Cairo Conferences, 1938

The International Telecommunications Conferences (Telegraph and Telephone Conference, and Radio Conference) convened at Cairo, Egypt, on February 1, 1938 to revise the telephone, telegraph, and

radio regulations annexed to the international telecommunication convention signed at Madrid on December 9, 1932. With respect to the Telegraph and Telephone Conference, the Chairman of the American Delegation wrote:

The principal proposals of interest to the Delegation of the United States were on those matters which affected the charges to be paid by the users of the international telegraph service and those proposals which affected the revenues of the American telegraph companies. These proposals related (1) to the unification of plain language, cipher language, and code language; (2) to the notification of the equivalents for the gold franc, which is used as the unit for the composition of rates and the establishment of international accounts; and (3) to the minimum number of words to be charged for in each class of telegram.

Telegraph
and Tele-
phone Con-
ference

In accordance with your instructions of January 3, 1938 the Delegation did not sign the Telegraph Regulations adopted at the Cairo Conference.

The Delegation did not participate in the telephone deliberations of the Telegraph and Telephone Conference. These were followed, however, by representatives of interested American companies.

The Regulations deal with the conduct and service of the telephone business in Europe. Since the American companies are not affected by them, and the United States neither signed them nor contemplates adhering to them, it is deemed unnecessary to discuss them in detail.

Report to the Secretary of State by the Chairman of the American Delegation to the International Telecommunications Conferences, Cairo 1938 (Department of State Conference Ser. 39, 1939) 12-17.

The General Radio Regulations annexed to the International Telecommunications Convention of Madrid have in general been satisfactory to the United States. However, the ever-increasing demands for additional radio frequencies due to a never-ceasing expansion of the mobile, fixed, and broadcasting services necessitated a further tightening of existing rules to make the most economical use possible of facilities at present available, as well as a reconsideration of the existing allocation of frequencies in the light of experience gained since the Madrid Conference.

Radio
Conference

The following are some of the more important decisions of the Cairo Radio Conference which have been incorporated in the Revised Regulations adopted at that Conference:

1. Adoption of a plan for radio channels for the world's seven main intercontinental air routes, including calling and safety service channels.
2. Widening of the high-frequency broadcast bands to a total of 300 kilocycles and the adoption of special bands for tropical regions for regional use.

3. The limitation of the use of spark sets to three channels and the outlawing of spark sets except below 300-watt output.
4. Improved tolerance and band-width tables.
5. The extension of the allocation table to 200 megacycles for the European region. Other regions were given the right to effect their own arrangements above 30 megacycles.
6. Establishment of further restrictions on the use of 500-kilocycle frequency for traffic.
7. Bringing up to date of regulations relative to the maritime and aeronautical services.

Ibid. 17.

On September 18, 1939, the President issued his proclamation of the Revision of the General Radio Regulations annexed to the International Telecommunication Convention signed at Madrid on December 9, 1932, and the Final Protocol to the Revision of the General Radio Regulations, embracing reservations made by several Governments, which were signed at the International Radio Conference held at Cairo, Egypt, February 1-April 9, 1938. The Senate gave its advice and consent to the ratification of the Revision of the General Radio Regulations and the Protocol on July 21, 1939, and the President ratified the instruments on August 11, 1939. In accordance with article 7 of the Madrid International Telecommunication Convention of December 9, 1932, the Secretary of State notified the Bureau of the International Telecommunication Union at Bern, Switzerland, of the ratification of the United States on August 24, 1939, which notice had the effect of bringing the revised regulations and the protocol into force with respect to the United States.

Department of State, I *Bulletin*, no. 13, p. 294 (Sept. 23, 1939). For the Madrid convention of 1932, see 4 *Treaties*, etc. (Trenwith, 1938) 5379. For the Cairo revision of the general radio regulations and the final radio protocol, see *Treaty Series* 948.

Radio propaganda

In addition to problems of interference, the content of radio broadcasts has been the subject of international regulation. Propaganda broadcast in one state to be heard abroad has given rise to ill-feeling. To prevent and counteract this, a conference under League of Nations auspices adopted at Geneva, on September 23, 1936; the international convention concerning the use of broadcasting in the cause of peace. The signatories are European and Latin American states. The parties agree to prohibit, and to stop without delay, broadcasts within their territories of such a character as either to incite to war or to acts likely to lead thereto, or to incite to acts incompatible with the internal order or security of any party. They also agree to prohibit and prevent broadcasts of statements likely to harm international good understanding, the incorrectness of which is known or ought to be known to the persons responsible for the broadcast.

They also undertake that stations shall broadcast, concerning international relations, information which has been verified; and they agree to facilitate broadcasts calculated to promote better understanding and peace.

186 League of Nations Treaty Series (1938) 301. See also John D. Tomlinson, *International Control of Radiocommunications* (1938) 226-233, and Department of State, Treaty Information Bulletin, no. 85 (Oct. 1931), pp. 7-9. With respect to the international problem of radio propaganda, see Biro, "International Aspects of Radio Control", in 2 *Journal of Radio Law* (1932) 45, 50-65. See further International Institute of Intellectual Cooperation, *Broadcasting and Peace* (1933). See also the South American regional agreement on radiocommunications, signed at Buenos Aires Apr. 10, 1935 (2 *Journal des télécommunications* [1935] 125, 134, 138).

Pursuant to a resolution adopted May 2, 1923 by the Fifth International Conference of American States at Santiago, the Inter-American Committee on Electrical Communications met at Mexico City in 1924. At this meeting the inter-American electrical communications convention was signed July 21, 1924 by delegates from the following states: Argentina, Brazil, Cuba, Dominican Republic, Mexico, Panama, Paraguay, and Salvador; it was also signed *ad referendum* by delegates from Colombia, Costa Rica, Guatemala, Nicaragua, Peru, and Uruguay. It was not signed by the delegates of the United States, who expressed objection to the procedure followed and to the convention adopted. It was ratified by Mexico, Dominican Republic, Panama, and Paraguay.

Regional
radio
agreements:
Mexico
City, 1924

Report of the Delegation of the United States, Inter-American Committee on Electrical Communications, Mexico City, May 27 to July 22, 1924 (1927); II Hudson, *International Legislation* (1931) 1292. See also Stewart, "The Inter-American Committee on Electrical Communications", 7 *Air Law Rev.* (1936) 351. For the objections of the United States to the convention concluded, see the *Report of the Delegation*, etc., *supra*, pp. 8-14, 134-139.

In connection with the informal inter-American conference on radio-communications at Washington, Jan. 7, 1916, the United States urged that the American republics should own or control the stations on their territories so that they might be available to the respective governments in case of defense emergencies. 1915 For. Rel. 24; 1916 For. Rel. 5-10, 976 *et seq.*

With respect to radio agreements between the United States and Canada and the notes exchanged between them on May 5, 1932, concerning radio broadcasting in Canada, the following instruction was sent to the Embassy in Mexico:

Bilateral
agreements—
U. S. —
Canada

In 1924 the Secretary of Commerce, whose jurisdiction at the time included radio, called a conference of individuals interested in radio in the United States. Persons charged with the administration of radio in Canada attended the meeting; and an informal understanding was entered into between those persons

and the Chief of the Radio Division of the Department of Commerce. Under that informal understanding the Secretary of Commerce declined to assign six channels to American stations and made assignments on eleven others only where the geographical location and the power involved insured a minimum of interference in Canada. The Canadian authorities assigned to Canadian stations the six channels not assigned in the United States and made assignments on the eleven others mentioned only where the geographical location and power involved insured a minimum of interference in the United States.

The situation was changed in 1926 when a Federal Court held that the Secretary of Commerce did not have the authority to require broadcasting stations to remain on frequencies assigned by him. Broadcasting stations in the United States then "jumped" the frequencies assigned to Canadian stations. When the Federal Radio Commission began functioning in 1927, it enforced the informal understanding of 1924 upon American stations.

A conference of representatives of the Canadian and United States Governments was held in 1927 to allocate broadcasting frequencies as between the two countries, but the representatives failed to reach an agreement. While the Governments recognized the exceedingly tenuous nature of the understanding of 1924, both continued to make assignments in accordance with its provisions.

. . . On March 2, 1932, the Canadian House of Commons appointed a committee for the purpose, among others, of recommending a complete technical scheme for radio broadcasting in Canada. . . . The committee held several public sessions on the question of nationalizing the Canadian broadcasting system and then held private sessions to work out a technical plan. After the technical plan had been tentatively formulated, the Canadian Government submitted a copy of it to this Government with the request that it be studied from the standpoint of any readjustments which might be necessary in the United States to permit the plan to be made effective in Canada.

A study of the plan made late in April revealed that the Canadian technical experts had followed the principles applied by the Federal Radio Commission in making assignments to American broadcasting stations. It also revealed that the channels to be used by the Canadian stations were, with the exception of 540, 1050 and 1100 kilocycles, already in use by Canadian stations under the informal understanding respected by both Governments. Of the three channels mentioned, 540 kilocycles is just outside the broadcast band and its use will cause no interference to American stations. On 1050 kilocycles there is a four-hour time difference between the American station using the frequency and the proposed Canadian station, and on 1100 kilocycles there is a three-hour time difference. On 1050 kilocycles the power of the Canadian station (500 watts) is to be such that, considered with the time difference, no interference should result. On 1100 kilocycles the power of the American station is such that its coverage is regarded as limited; this coupled with the time dif-

ference should permit both stations to operate without either interfering with the effective service area of the other.

While under the technical plan recommended by the committee three frequencies not now used by Canadian stations will be used by such stations in the future, this is compensated for by the fact that Canada is surrendering the use of 5 channels (580, 890, 1010, 1200, and 1210 kilocycles) now shared by Canadian and American stations. . . .

Although the Canadian note requests, and the United States reply agrees, that the necessary readjustments of American broadcasting stations will be made, both Governments are well aware of the fact that no readjustments will be necessary in the United States to permit the plan to be made effective. The effect of the exchange of notes is largely to permit the committee of the Canadian House of Commons to have a formal basis for its technical recommendations.

The Department is very desirous that the exchange of notes be not construed by the Mexican Government as an effort to effect an understanding between the United States and Canada without reference to the broadcasting needs of Mexico. It should be made clear that no real change in the situation has been made; and that it was only the fact that the whole broadcasting system in Canada was undergoing an investigation that led the Canadian Government to suggest that the existing understanding be made a matter of record.

This Government is of the opinion that subsequent to the Madrid conference there should be a conference of interested North American Governments for the allocation of frequencies. It was understood by the American representatives at San Antonio that the Mexican Government is probably of the same opinion. Likewise it appears that the Canadian Government favors the holding of such a conference. The exchange of notes between the United States and Canada will not in any way affect the holding of a North American conference or influence the decisions which may be reached by it.

The Assistant Secretary of State (Bundy) to the Ambassador in Mexico (Clark), no. 645, May 6, 1932, MS. Department of State, file 811.7612/63. For the exchange of notes of May 5, 1932 between the United States and Canada, see 47 Stat. 2704; Ex. Agree. Ser. 34.

In denying an application for authorization to operate station WLW with 500 kilowatts' power at all hours, the Federal Communications Commission referred to the Madrid telecommunication convention and the agreement of May 5, 1932 between Canada and the United States, and said:

"... The conclusion to be reached from the Treaties and Agreement mentioned is that the United States Government is legally bound to see that stations in this country are established and operated in such manner as not to interfere with the radio service of the Canadian station CFRB." *The Crosley Radio Corporation (WLW)*, First Annual Report of the Federal Communications Commission (1935) 203, 207.

"At the time the so-called 'Gentlemen's Agreement' was entered into between the United States and Canada [in 1924] for the division of broadcasting frequencies, broadcasting had not developed in Mexico. While Mexican broadcasting stations were operating with comparatively low power and in the interior of Mexico, little interference was occasioned to American stations. Within recent months, however, a number of high-powered stations have been erected in Mexico.

"As broadcasting stations in the United States and Canada are using all the frequencies in the broadcast band, Mexican stations of sufficient power necessarily interfere with American or Canadian stations."

The Acting Secretary of State (Castle) to Senator Watson, May 9, 1932, MS. Department of State, file 811.7612/59.

For the agreement with respect to radiobroadcasting effected by an exchange of notes of Aug. 24 and 28, 1940 between the United States and Mexico, see *Ex. Agree. Ser.* 196.

For the arrangements between the United States, Great Britain, Canada, and Newfoundland for prevention of interference with broadcasting by ships off the coasts of those countries, effective Oct. 1, 1925, see 4 *Treaties, etc.* (Trenwith, 1938) 4248.

For the agreement with respect to radiocommunications between private experimental stations, reached by the United States and Canada on Oct. 2 and Dec. 29, 1928 and Jan. 12, 1929, see *Treaty Series* 767A. This was continued in force by notes exchanged in 1934. *Ex. Agree. Ser.* 62.

For the arrangement of Feb. 26 and 28, 1929 between the United States, Canada, Cuba, and Newfoundland relating to the assignment of high frequencies to radio stations, see 4 *Treaties, etc.* (Trenwith, 1938) 4787.

For the agreements reached in 1934 by exchange of notes by the United States with Peru and with Chile, concerning radiocommunications between amateur stations on behalf of third parties, see *Ex. Agree. Ser.* 66 and 72.

See the exchange of notes between the United States and Canada in 1937 providing for the reciprocal exchange of information concerning the prospective issuance of new radio licenses or the possible alteration of frequencies which might involve interference with existing stations in the United States and Canada. It was stipulated that should an agreement be reached at the Inter-American Radio Conference at Habana, such agreement should govern the use of shared waves and the methods of determining interference. *Ex. Agree. Ser.* 109.

By an exchange of notes dated Oct. 28 and Dec. 10, 1938 between the United States and Canada, three arrangements concerning radiobroadcasting were concluded. *Ex. Agree. Ser.* 136.

For the exchange of notes between the Secretary of State (Hull) and the Canadian Minister (Marler) on Feb. 20, 1939 concerning the use of radio for civil aeronautical services, see *Ex. Agree. Ser.* 143.

Conference
at Mexico
City, 1933

A North and Central American Regional Radio Conference met in Mexico City, July 10–August 9, 1933, to effect such solution as was possible of the problem of interference between broadcasting stations in the several countries. Delegates from Canada, Costa Rica, Cuba, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and the United States participated. The Conference failed to reach agreement on the assignment of broadcasting frequencies, and no formal agreement was concluded. Recommendations were adopted

with respect to general conditions of broadcasting and to the allocation of frequencies between 1,600 and 6,000 kilocycles.

Instructions by the Acting Secretary of State (Phillips) to the Delegates of the United States (Sykes, Bland, and Davis), June 29, 1933, MS. Department of State, file 576.E1/309; report of the Chairman of the United States Delegation (Sykes) to the Secretary of State (Hull), Aug. 29, 1933, *ibid.* /345. See also Department of State, IX *Press Releases*, weekly issue 202, p. 93 (Aug. 10, 1933); Department of State, Treaty Information Bulletin, no. 45 (June 1933), p. 40; *ibid.*, no. 47 (Aug. 1933), pp. 15-16. For the recommendations agreed upon, see Federal Radio Commission, List of Items on Which Agreements Were Reached at . . . Mexico City, . . . 1933 (Department of State, Mimeographed Press Release, no. 8960, Aug. 18, 1933).

In 1934 several South American organizations and radio administrations formed the South American Broadcasting Union (U.S.A.R.D.) The South American regional agreement on radiocommunications was signed on behalf of several governments at Buenos Aires in Apr. 1935 and entered into force Jan. 1, 1936. This was revised at Rio de Janeiro in June 1937. 2 *Journal des télécommunications* (1935) 125; 4 *idem* (1937) 287. See also Tomlinson, *International Control of Radiocommunications* (1938) 212-214; 1 *Journal des télécommunications* (1934) 164, 340.

A preliminary regional radio conference was held at Habana March 15 to March 29, 1937, which was attended by delegations from Canada, Cuba, Mexico and the United States. The object of that conference was to establish a common ground among the states of North America on the subject of certain outstanding radio problems confronting the American nations . . . These problems comprise, among other things, dissatisfaction on the part of Canada, Cuba, and Mexico with the allocation to them of exclusive channels for broadcasting purposes, the limited facilities for the extension of these channels, the constantly recurring interference which naturally results, and which, in the case of the United States, caused numerous complaints not only on the part of government agencies but of private stations as well, the long standing questions of interference on the part of high-powered stations on the Mexican side of the Mexico - United States border and the problems resulting from the nature of certain of the programs emanating from those stations, the proper use of wave lengths in the high-frequency band and many problems of radio engineering practice which required discussion and standardization.

Preliminary
Habana
Conference,
1937

As a result of the preliminary conference in March, a set of resolutions was adopted which was designed to effect a solution of the problems involved and to standardize the views of the North American states with respect thereto. In this effort the conference was highly successful.

It was apparent that while the conclusions reached at the preliminary conference were of great value as regards the North American Continent, the deliberations would not be complete and

the problems could not be fully solved unless all states of the Western Hemisphere were given an opportunity to participate in the proposed arrangements in order to establish a clear understanding and uniformity of procedure throughout that Hemisphere. The conference at Habana recommended the proposed November meeting and approved a set of resolutions as a basis for discussion.

Secretary Hull to President Roosevelt, July 30, 1937, MS. Department of State, file 576 K1/167. With respect to the preliminary conference of Mar. 1937, see also the report of the American Delegation, Apr 5, 1937, *ibid.* /128; the Cuban Chargé d'Affaires ad Interim (Barón) to Mr. Hull, May 14, 1937, and enclosures, *ibid.* /135; the Acting Secretary of State (Welles) to the Delegates of the United States to the Inter-American Radio Conference (Craven and Norweb), Oct. 29, 1937, *ibid.* /329.

**Habana
Conference,
1937**

The first Inter-American Conference on Radiocommunications was held at Habana, Cuba, from November 1 to December 13, 1937. The following Governments were represented at the Conference: Argentina, Brazil, Canada, Chile, Colombia, Cuba, Dominican Republic, Guatemala, Haiti, Mexico, Newfoundland, Nicaragua, Panama, Peru, the United States, Uruguay, and Venezuela.

The Conference resulted in the signing of a convention, two agreements, and the final acts, namely, (1) the inter-American radiocommunications convention; (2) final acts of the first inter-American Radio Conference, including (a) resolutions, motions, and agreements, and (b) recommendations to the International Telecommunications Conferences to be held at Cairo, Egypt, February 1, 1938; (3) inter-American arrangement concerning radiocommunication; (4) North American regional broadcasting agreement.

Department of State, Treaty Information Bulletin, no. 99 (Dec. 1937), pp. 22-23. See also Otterman, "Inter-American Radio Conferences, Habana, 1937", in 32 A J I L. (1938) 569; First Inter-American Radio Conference (Habana, 1937): vols I, *Minutes*; II, *Documents*; III, *Instruments*.

**Inter-American
radio-
communica-
tions conven-
tion, 1937**

The Inter-American Radiocommunications Convention undertakes to establish, at least temporarily in the city of Habana and under the auspices of the Government of Cuba, an Inter-American Radio Office (C.I.R.) which, in a consultative capacity, is intended to provide for closer cooperation among the member states and for a fuller and more rapid dissemination of technical, legal and other data of interest in the field of communications, all for the purpose of an improvement of engineering practices and a better understanding of the legal problems in the field of communications in the participating countries.

The Convention provides in considerable detail for the organization and future conduct of conferences, including the inter-American pronouncement with respect to voting.

Part 3 of the Convention undertakes to apply throughout the American continent numerous special provisions appearing in the South American Regional Convention on Radiocommunica-

tions and affirms the sovereign right of all nations to the use of every broadcasting channel, while recognizing at the same time the need for regional arrangements in view of the present state of the art. Accordingly, provision is made for the negotiation of bilateral agreements when need therefor arises. . . .

The inter-American arrangement concerning radiocommunications, a purely administrative agreement, seeks to effect a standardization throughout the Americas of technical matters involved in the art of radiocommunications, particularly with respect to allocations, tolerances, spurious emissions and interference, use and nonuse of certain air calling and distress frequencies, amateurs and the receipt and transmission by them of third-party messages, an international police radio system and radio aids to air navigation, all with respect to frequencies outside the standard broadcasting band.

The North American Regional Broadcasting Agreement undertakes to establish in that region, which consists of Canada, Cuba, Dominican Republic, Haiti, Mexico, Newfoundland and the United States and within the standard broadcast band, frequency assignments to specified classes of stations on clear, regional and local channels with a view to avoiding interference which in this region has caused great inconvenience to radio listeners. It is believed that the principles laid down in this Convention, if carried into effect, will result in general satisfaction not only to the listening public but to the broadcasters as well.

North American regional broadcasting agreement, 1937

This Delegation is convinced that the Conference just concluded was one of extreme importance to the United States and to the other governments participating therein. The establishment of broad general principles on a sure basis, the agreement on many technical matters involved in sound engineering practice, the conclusion of an arrangement for a more effective frequency allocation and the avoidance of interference in the North American region, the establishment of a centralized consultative office, the formulation of procedure for future conferences, the agreement of the American states upon recommendations to the forthcoming Cairo conferences, and the common understanding evidenced by the Inter-American resolutions are believed to afford an adequate basis for the more effective functioning of radiocommunications in the Americas and the better service of the public and of the governments concerned.

Report of the Chairman of the Delegation of the United States (Craven) to the Secretary of State (Hull), Jan. 19, 1938, MS. Department of State, file 576.K1/455.

The inter-American radiocommunications convention, signed Dec. 13, 1937, was ratified by the President of the United States, with the advice and consent of the Senate, on June 30, 1938. Treaty Series 938; 53 Stat. 1576. The convention has also been ratified by Cuba, Haiti, Dominican Republic, Peru, Canada, Panama, Mexico, and Brazil. Paraguay deposited her adherence *ad referendum*.

The North American regional broadcasting agreement was signed Dec. 13, 1937 by representatives of Canada, Cuba, Dominican Republic, Haiti, Mexico, and United States. On June 30, 1938 the President of the United States ratified the agreement, the Senate having given its advice and consent thereto on June 15, 1938. Treaty Series 962; Department of State, Treaty Information Bulletin, no. 105 (June 1938), p. 192; Department of State, II *Bulletin*, no. 34, p. 192 (Feb. 17, 1940); IV *idem*, no. 83, p. 119 (Jan. 25, 1941).

For the inter-American arrangement, see Ex. Agree. Ser. 200.

For the final acts of the conference, see Department of State, Treaty Information Bulletin, no. 105 (June 1938), pp. 209 *et seq.*

With respect to the recommendations adopted by the North American Regional Radio-Engineering Meeting in Jan. 1941, see Department of State, IV *Bulletin*, no. 88, pp. 236-237 (Mar. 1, 1941).

Central
American
Conference,
1938

In view of the effect of climatic conditions upon radio broadcasting in the standard broadcast band of 550 to 1600 kilocycles, as well as the proximity of the states of Central America and Panama to one another and to the Canal Zone, the international radio conference, held at Cairo, Egypt, from February 1 to April 8, 1938, considered evolving a plan whereby radio frequencies for broadcasting purposes might be made available by the Canal Zone, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama outside the standard broadcasting band. The result of that consideration is Article 7, section 8-I, paragraphs 3 (b) and (c) of the Cairo Revision of the General Radio Regulations.

With a view to the conclusion of such a regional agreement as is contemplated in the said subsection (c) the Government of Guatemala on September 2, 1938 issued an invitation to the Governments of Costa Rica, El Salvador, Honduras, Nicaragua, Panama and the United States, to be represented with Guatemala in a regional radio conference for Central America, Panama and the Canal Zone.

The conference convened at Guatemala City on November 24, 1938 for the purpose of arriving at an equitable allocation of frequencies for broadcasting purposes in the band 2300-2400 kilocycles, having due regard to the protection of United States military frequencies in use in the Canal Zone. The result of this conference is the Regional Radio Convention for Central America, Panama and the Canal Zone . . . signed on December 8, 1938 at Guatemala City.

Secretary Hull to President Roosevelt, Apr. 10, 1939, MS. Department of State, filed 574.G2A/146.

Central
American
regional
convention

Part I of the convention allocates primary and secondary frequencies in the radio frequency band of 2,300 to 2,400 kilocycles to the various Central American Republics, Panama, and the Canal Zone. The convention contains an agreement on the part of each government not to use any primary channel assigned to any of the

other contracting governments except as provided in the convention and an agreement that nothing in the convention shall be construed as precluding the consummation by the United States of America of other radio agreements concerning the defense of the Canal Zone.

Treaty Series 949; 54 Stat. 1675. See also instructions to the American Delegation, the Secretary of State (Hull) to the Minister to Guatemala (Des Portes), Nov. 14, 1938, MS. Department of State, file 574.G2A/61; report of Mr. Des Portes to Mr. Hull, Feb. 9, 1939, *ibid.* /133½. See further, Department of State, XIX *Press Releases*, weekly issue 483, pp. 496-497 (Dec. 27, 1938).

After considerable negotiation between the United States and Panama, beginning in 1911, Decree 130, of 1914, was issued by the President of Panama on August 29, 1914, whereby "the radio-telegraphic stations fixed and movable and everything relating to wireless communications in the territory and territorial waters of Panama" were placed "under the complete and permanent control of the United States".

U.S. and
Panama

1914 For. Rel. 1036-1052; 3 Treaties, etc. (Redmond, 1923) 2768. See also 1912 For. Rel. 1206-1240; 1915 For. Rel. 1155-1161.

"... it is the view of the Government of the United States that the decree confirmed as a definite agreement between the Governments of the United States and of Panama the right of the United States, under the Treaty of November 18, 1903, to exercise permanent and complete control over wireless communication within the Republic of Panama. This control was expressly stated to be permanent ... The United States requested such control not simply because war conditions made it necessary, but because such control was regarded as essential for the proper protection of the Panama Canal and the guarantee of the independence of the Republic of Panama under the terms of the Treaty both in time of war and in time of peace." The Secretary of State (Hughes) to the Panamanian Minister (Alfaro), Jan. 11, 1923, MS. Department of State, file 819.74/106.

By a decree of Dec. 29, 1930, the President of Panama abrogated Decree 130 of 1914. The United States expressed willingness to enter into a new arrangement for control necessary for the protection and operation of the Canal but less onerous to the Republic of Panama. The Minister to Panama (Davis) to the Secretary of State (Stimson), telegram 94, Jan. 1, 1931, and Mr. Stimson to Mr. Davis, telegram 30, Feb. 21, 1931, MS. Department of State, file 819.74/183; the Assistant Secretary of State (White) to the Chargé d'Affaires ad interim to Panama (Bucknell), no. 261, Nov. 23, 1931, *ibid.* /225A; Mr. Davis to Mr. Stimson, no. 1026, Apr. 22, 1932, *ibid.* /235.

As a result of negotiations, a convention was signed on behalf of the United States and Panama on Mar. 2, 1936, accompanied by three exchanges of notes, which upon entering into force would revise the regulation of radiocommunication in the Republic of Panama and the Canal Zone. Department of State, XIV *Press Releases*, weekly issue 336, p. 200 (Mar. 2, 1936).

European
broadcasting
arrangements

The allocation of frequencies to broadcasting stations has been a difficult problem in the European region. After efforts had been made by the International Broadcasting Union (U.I.R.), established in 1925 to consider the problem of interference in Europe, a European Radio-Electric Conference was held at Prague in 1929. This was attended by representatives of government administrations and private companies, as well as by observers (including an American delegation). It drew up an allocation agreement for European stations which became effective on June 30, 1929. Following upon the Telecommunication Conference of Madrid, the European Conference of Radiocommunications met at Lucerne in May and June of 1933. On June 19, 1933 the states represented at this Conference signed the European broadcasting convention with the Lucerne plan of allocations annexed thereto. The United States was represented at the European Broadcasting Conference at Montreux in March and April 1939, which adopted on April 15, 1939 the convention of the European broadcasting conference, and the plan of Montreux for allocation of frequencies.

Tomlinson, *International Control of Radiocommunications* (1938) 178-212; the Assistant Secretary of State (Carr) to the Chairman of the American Delegation (Terrell), Mar. 19, 1929, MS. Department of State, file 576.B1/101; the Secretary of the American Delegation (Whittemore) to Secretary Stimson, May 6, 1929, *ibid.* /146; Report of the American Delegation to the European Radio Conference at Prague, Czechoslovakia, April 4-13, 1929 (mimeographed); report of the American Delegate (Farley) to Secretary Hull, May 1, 1939, MS. Department of State, file 576.F1/221; plan of Montreux, *ibid.* /223; 6 *Journal des télécommunications* (1939) 137.

"... A conference of African Administrations held at Pretoria in October, 1935, drew up an Agreement establishing an African Telecommunication Union, composed of the Union of South Africa, Basutoland, Bechuanaland, the Portuguese colonies of Angola and Mozambique, the Belgian Congo, Kenya, Uganda, Tanganyika, Nyasaland, Northern Rhodesia, Southern Rhodesia, and Swaziland. The Agreement repeats a number of provisions of the Telecommunication Convention of Madrid, with a few special applications for Africa. A set of Telegraph Regulations were annexed to the Agreement, but the telephone and radio regulations were left for a later conference to draw up. The Bureau of the African Union is the Telegraph Administration of the Union of South Africa." Tomlinson, *International Control of Radiocommunications* (1938) 251.

The African telecommunication agreement was amended at Capetown in Jan. 1939. See the Minister to South Africa (Keena) to the Secretary of State (Hull), no. 626, Aug. 1, 1939, and enclosure, MS. Department of State, file 571.D1/11.

REGULATION OF USE

SECRECY

§354

Article 24 of the international telecommunication convention signed at Madrid, December 9, 1932, provides:

§ 1. The contracting governments agree to take all the measures possible, compatible with the system of telecommunication used, with a view to insuring the secrecy of international correspondence.

§ 2. However, they reserve the right to communicate international correspondence to the proper authorities, in order to insure either the application of their internal legislation, or the execution of international conventions, to which the governments concerned are parties.

49 Stat. 2411-2412; 4 Treaties, etc. (Trenwith, 1938) 5388.

Article 2 of the general radio regulations annexed to this convention, reenacted as article 2 of the Cairo revision (of 1938) of the general radio regulations, both of which were signed by the United States, provides:

"The administrations agree to take the necessary measures to prohibit and prevent:

"(a) the unauthorized interception of radio communications not intended for the general use of the public;

"(b) the divulging of the contents or of the mere existence, the publication or use, without authorization, of radio communications which may have been intercepted intentionally or otherwise."

49 Stat. 2449; 4 Treaties, etc. (Trenwith, 1938) 5394; Treaty Series 948, p. 146.

See also article 3 of the above regulations.

The radiotelegraph convention, signed at Washington on Nov. 25, 1927, between the United States and other powers, provides in article 5:

". . . The contracting Governments agree to take or to propose to their respective legislatures the necessary measures to prevent:

"(a) The unauthorized transmission and reception by means of radio installations of correspondence of a private nature.

"(b) The unauthorized divulging of the contents, or simply of the existence, of correspondence which may have been intercepted by means of radio installations.

"(c) The unauthorized publication or use, of correspondence received by means of radio installations.

"(d) The transmission or the placing in circulation of false or deceptive distress signals or distress calls."

45 Stat. 2762; 4 Treaties, etc. (Trenwith, 1938) 5033.

See also the general regulations annexed to this convention, arts. 2, 7, and 8. 45 Stat. 2780, 2785-2786; 4 Treaties, etc. (Trenwith, 1938) 5040, 5045, 5048.

The history of provisions relating to telegraphic (including radiotelegraphic) secrecy is contained in a note submitted by the International

Bureau of the Telegraph Union in connection with an inquiry, directed by the Council of the League of Nations to the Permanent Legal Committee of the Organization for Communications and Transit, with reference to a proposal of the Advisory Committee on Traffic in Opium for the exchange between countries of telegrams transmitted in connection with smuggling operations. Basing its decision on the St. Petersburg convention of 1875 and its international service regulations, said to be of equal validity with the convention, and upon the Washington radiotelegraph convention of 1927, the Committee ruled against the legality of the proposal. League of Nations, *Official Journal* (1930) 1547-1552. See also *Annual Digest* 1929-30, Case No. 255.

With reference to the unauthorized publication or use of communications, see sec. 605 of the Federal Communications Act, approved June 19, 1934 (48 Stat. 1103; 47 U.S.C. §605).

RATES

§355

In the final protocol to the international wireless telegraph convention of London, 1912, note was taken of the following declaration:

The Delegation of the United States declares that its government is under the necessity of abstaining from all action in regard to rates, because the transmission of radiograms as well as of ordinary telegrams in the United States is carried on, wholly or in part, by commercial or private companies.

38 Stat. 1714, 1715; 3 Treaties, etc. (Redmond, 1923) 3057-3058.

Mexico City
draft conven-
tion

Article XXII [of the proposed draft convention] dealt with the rates for the transmission of messages either by telegraph, cable, or radio. The United States has always declined to submit this phase of communications to international regulation.

The article was also in contravention of the settled law of the United States which confers upon the Interstate Commerce Commission authority to pass upon the reasonableness of rates and the classification of messages. See section 400 of the act of Congress approved February 28, 1920 (41 Stat. L. 456, 475).

Report of the Delegation of the United States, Inter-American Committee on Electrical Communications, Mexico City, May 27 to July 22, 1924 (Washington, 1927) 11-12. See also the report of the American Delegation to the International Radio-Telegraphic Conference at London, 1912, MS Department of State, file 574C1/75.

In a decision affirming a decree of the District Court of the United States for the District of Puerto Rico restraining the enforcement of an order of the Public Service Commission of Puerto Rico for

the reduction of foreign cable rates, the United States Circuit Court of Appeals said:

It is true that the Act of March 2, 1917 (39 Stat. pt. 1, p. 964, §38 (Comp. St. 1918 [U.S. Comp. Stat. Ann., 1919 Supp.], §3803p), declares that the Interstate Commerce Act and its amendments shall not apply to Porto Rico; but this, we think, means the local and intra-island affairs and rates of Porto Rico, and not to cable lines, in respect to the rates of which parties in foreign countries and in the United States are interested.

The conclusion is that, while Congress, under its plenary power, had the unquestionable right to do so, it never has delegated to the legislative assembly of Porto Rico authority to regulate interpossessional, interterritorial, interstate, or foreign cable rates, and that the local legislative body, therefore, was without authority to create a commission for that purpose, and that, while the Interstate Commerce Commission may not exercise jurisdiction in respect to Porto Rican intra-island rates, that it has jurisdiction over her interpossessional and foreign instruments of commerce. We think, therefore, that the District Court of the island was right in holding that the assembly was without authority over the subject-matter of cable rates.

Benedicto et al. v. West India & Panama Telegraph Co., Limited, et al., 256 Fed. 417, 420-421 (C.C.A. 1st, 1919).

By the Communications Act of 1934, the Federal Communications Commission is given authority over rates charged by common carriers engaged in interstate or foreign communication by wire or radio. 48 Stat. 1070-1072.

ROUTING OF MESSAGES

§356

In the report of the American Delegation to the meeting of the Inter-American Committee on Electrical Communications held at Mexico City, May 27-July 22, 1924, attention was called to article XVII of the proposed draft convention on electrical communications, which reads: "The sender shall have the right to select the route for his message." The following comment was made:

A consideration that has moved the United States to decline to become a party to the telegraph convention concluded at St. Petersburg in 1875 and revised at Lisbon in 1908 has been the so-called "via" provision in Article XLI of the regulations annexed to the International Telegraph Convention concluded at St. Petersburg, and the revision thereof, which provides as follows: [The provisions in question prescribe the terms and conditions under which senders of messages are given the right to prescribe the route by which messages are to be transmitted.]

It is the practice of private communication companies organized in the United States to enter into contracts with other communication companies respecting the exchange of traffic. It is alleged by the companies that these special arrangements aid materially in the rapid handling of traffic and also result in economies which make it possible to lower rates. The United States has not considered it advisable to obligate communication companies operating within its borders to grant such a right to the senders of messages. Although the objectionable character of this provision was pointed out by the delegates representing the United States, it was incorporated in the convention.

Report of the Delegation of the United States, Inter-American Committee on Electrical Communications, Mexico City, May 27 to July 22, 1924 (1927) 11.

CODES

§357

The Department of State, in a letter of June 1923, replied as follows to an inquiry concerning the transmission of code messages by American cable companies:

The Department has received your letter dated April 18, 1923, requesting to be informed whether by their charter or by any official law or regulation the Western Union Cable Company is obliged to take for transmission by cable within the United States and abroad, combinations of ten letters each, paying as one sole word, even if such combinations of letters be not pronounceable.

The United States is not a party to the International Telegraph Convention signed at St. Petersburg on July 10/22, 1875, and American telegraph and cable companies are not subject to the International Telegraph Service Regulations as revised at Lisbon on June 11, 1908, with respect to messages filed with the companies in the United States.

The transmission of telegrams between foreign countries is governed by the provisions of the International Telegraph Convention and the International Telegraph Service Regulations to which reference has been made, when the countries between which the messages are sent are parties to the Convention.

For your information, the following pertinent sections of the International Telegraph Service Regulations, 1908, are quoted:

“REGULATION VI

“. . . SEC. 2. All the Administrations admit, in all their relations, telegrams in plain language. They may decline to forward or to receive for delivery private telegrams composed either wholly or in part in secret language; but they must allow these telegrams to pass in transit unless the service be suspended as defined in article 8 of the St. Petersburg Convention.”

"REGULATION VIII

"... SEC. 2. The words, whether genuine or artificial, must be formed by syllables capable of pronunciation according to the *current* usage of the following languages:—German, English, Spanish, French, Dutch, Italian, Portuguese or Latin. *Artificial words must not contain the accented letters ä, é, â, ê, ñ, ö, ü.*"

The Assistant Secretary of State (Harrison) to Richard Fuchs, June 18, 1923, MS. Department of State, file 811.733 '41.

See the *Report on the History of the Use of Codes and Code Language, the International Telegraph Regulations Pertaining Thereto, and the Bearing of This History on the Cortina Report (1928)*, by Major William F. Friedman, technical adviser of the American Delegation to the International Radiotelegraph Conference of Washington, 1927.

For instructions to the Chairman of the American Delegation to the International Telegraph Conference at Brussels, see Acting Secretary Castle to Leland Harrison, Aug. 22, 1928, MS. Department of State, file 572.F1/321.

See also Stewart, "The International Telegraph Conference of Brussels and the Problem of Code Language", in 23 A.J.I.L. (1929) 292-306.

"... It may be pointed out ... that the United States is not a party to the International Telegraph Convention and Regulations and that the International Bureau of the Telegraph Union at Berne is authorized to interpret the provisions of the Telegraph Regulations." Assistant Secretary Johnson to E. W. Ross, Feb. 9, 1929, MS. Department of State, file 572.F1/325.

The Secretary of State presents his compliments to His Excellency the Royal Italian Ambassador and has the honor to acknowledge the receipt of his note No. 5118 of June 18, 1940, relative to the desire of the Bank of Italy to correspond in code with its representatives in the United States.

In reply the Secretary of State has the honor to inform the Ambassador that there are no prohibitions in the United States to the use of ordinary, recognized commercial codes in telegraphic messages and consequently no approval of this Government or any Department thereof is required.

The Secretary of State (Hull) to the Italian Ambassador (Colonna), memorandum, June 25, 1940, MS. Department of State, file 811.731/836.

CENSORSHIP AND CONTROL

§358

Article 26 of the telecommunication convention, concluded at Madrid on December 9, 1932 between the United States and other powers, provides:

§1. The contracting governments reserve the right to stop the transmission of any private telegram or radiotelegram which might appear dangerous to the safety of the state or contrary to

the laws of the country, to public order, or to decency, provided that they immediately notify the office of origin of the stoppage of the said communication or of any part thereof, except when it might appear dangerous to the safety of the state to issue such notice.

§2. The contracting governments likewise reserve the right to interrupt any private telephone communication which might appear dangerous to the safety of the state or contrary to the laws of the country, to public order, or to decency.

49 Stat. 2413; 4 Treaties, etc (Trenwith, 1938) 5389.

The St. Petersburg convention of 1875 provided in article 8:

"Each Government also reserves to itself the right to suspend the international telegraph service for an indefinite time, if it considers it necessary, either generally or only on certain lines and for certain kinds of correspondence, subject to the obligation to notify the suspension immediately to the other contracting Governments." 66 Br. & For. State Paps. (1874-75) 22.

The foregoing translation is contained in the Note on Telegraphic Secrecy, submitted by the International Bureau of the Telegraphic Union to the Permanent Legal Committee of the Organization for Communications and Transit of the League of Nations in 1930. The note goes on to say:

"The Service Regulations annexed to the Convention hardly modify these provisions.

"The existing provisions are by no means new; they are found almost word for word in the first international agreements on telegraphy. . . .

"That is why the documents of the various telegraphic conferences contain no discussion of the provisions and no explanation of the reasons for them. These reasons, however, are self evident, and their justification is obvious—to safeguard States in time of war or internal troubles.

"During the world war of 1914-1918 in particular, the administrations of the Union applied these provisions.

"When hostilities began, the belligerent States, with a view to being able to control telegraphic correspondence, totally forbade the use of secret language, and most of the neutral States enacted similar measures.

"Furthermore, both belligerents and neutrals restricted the use of plain language to certain specific languages most in use; several prohibited commercial marks and trade abbreviations; they rejected telegrams containing no text or only a single word, telegrams the sense of which was not clear to the clerks, unsigned telegrams and registered or abbreviated addresses or signatures, etc."

League of Nations, *Official Journal* (1930) 1550.

The Communications Act of 1934 provides in section 606:

Communica-
tions Act,
1934

Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the [Federal Communications] Commission, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its ap-

paratus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners.

48 Stat. 1104.

Article 5 of Hague Convention XIII of 1907, concerning the rights and duties of neutral powers in naval war, provides:

Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with belligerent forces on land or sea.

Use of neutral territory

36 Stat. 2415, 2427; 2 Treaties, etc. (Malloy, 1910) 2352, 2359.

Article 3 of Hague Convention V of 1907, respecting the rights and duties of neutral powers and persons in case of war on land, contains the following provisions:

Belligerents are likewise forbidden to:

(a) Erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea;

(b) Use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.

36 Stat. 2310, 2322-2323; 2 Treaties, etc. (Malloy, 1910) 2290, 2297-2298. See also arts. V, VIII, and IX of the same convention regarding neutral duties.

President Wilson, by Executive Order 2011, dated August 5, 1914 and communicated to the belligerent governments on August 7, decreed that—

all radio stations within the jurisdiction of the United States of America are hereby prohibited from transmitting or receiving for delivery messages of an unneutral nature, and from in any way rendering to any one of the belligerents any unneutral service, during the continuance of hostilities.

Ex. Or. of Aug. 5, 1914

Enforcement of the order, which was effective from date of issuance, was delegated to the Secretary of the Navy.

MS. Department of State, file 811.741/58. See also 1914 For. Rel. Supp. 667-668, regarding the use by the German Government of high-powered wireless stations at Sayville, Long Island, and at Tuckerton, New Jersey.

Rule 14 of President Wilson's proclamation of Nov. 13, 1914, governing the use of the Panama Canal and neutrality in the Canal Zone, provided:

"Rule 14. The radio installation of any vessel of a belligerent power, public or private, or of any vessel falling under Rule 2, shall be used only in connection with Canal business to the exclusion of all other business

while within the waters of the Canal Zone, including the waters of Colon and Panama Harbors." 38 Stat. 2039, 2041; 1914 For. Rel. Supp. 552, 555.

Rule 2 included within the scope of the regulations vessels employed by a belligerent power as a transport or fleet auxiliary or in any other way for the purpose of prosecuting or aiding hostilities, but excluded hospital ships. 38 Stat. 2039, 2041; 1914 For. Rel. Supp. 553.

On August 11, 1914 the following tentative alternative propositions were submitted by the United States to the German, French, and British Governments for their comments:

- (1) All the belligerents may send and receive wireless messages in code or cipher via Sayville and Tuckerton. The American censors at those stations to receive codes and ciphers used in order to be able to see that the neutrality of the United States is not violated. Ciphers and codes to remain known only to the censors and the United States Government, also the contents of the messages sent; or
- (2) Germany may use the English or French cables. The telegrams of all the belligerents submitted to the censor as stated before.

The British Government replied that it "would prefer the adoption of the first, namely, that the wireless stations at Sayville and Tuckerton should be made available for the transmission of the telegraphic correspondence between the belligerent governments and their embassies subject to strict censorship by the United States authorities" and added that "His Majesty's Government trust the United States Government will agree with them that it is an essential part of the duties of the censor to paraphrase all messages of belligerent governments and their embassies in order to prevent, if possible, any hidden meaning being conveyed".

The German Government indicated its willingness to accept the propositions concerning telegraphic communication, provided that censorship were applied equally to all the belligerents.

The Secretary of State (Bryan) to the Ambassador in Great Britain (Page), telegram of Aug. 11, 1914, MS. Department of State, file 811.741/16; Mr. Page to Mr. Bryan, telegram 514, Aug. 30, 1914, *ibid.* 763.72111/93; the Ambassador to Germany (Gerard) to Mr. Bryan, telegram of Aug. 28, 1914, *ibid.* 811.741/29; 1914 For. Rel. Supp. 670, 676.

Ex. Or. of
Sept. 5, 1914

On September 5, 1914 President Wilson issued Executive Order 2042 regarding Government control of high-powered radio stations, reading as follows:

WHEREAS an order has been issued by me dated August 5, 1914, declaring that all radio stations within the jurisdiction of the United States of America were prohibited from transmitting or receiving for delivery messages of an unneutral nature and from

in any way rendering to any one of the belligerents any unneutral service; and

WHEREAS it is desirable to take precautions to insure the enforcement of said order in so far as it relates to the transmission of code and cipher messages by high-powered stations capable of transatlantic communication;

Now, therefore, it is ordered by virtue of authority vested in me by the radio act of August 13, 1912, that one or more of the high-powered radio stations within the jurisdiction of the United States and capable of transatlantic communication shall be taken over by the Government of the United States and used or controlled by it to the exclusion of any other control or use for the purpose of carrying on communication with land stations in Europe, including code and cipher messages.

The enforcement of this order and the preparation of regulations therefor is hereby delegated to the Secretary of the Navy, who is authorized and directed to take such action in the premises as to him may appear necessary.

1914 For. Rel. Supp. 678.

In a circular note to the diplomatic representatives of foreign governments, dated September 22, 1914, the Department of State enclosed a copy of regulations for the operation of the radio station at Tuckerton, New Jersey, in the form of instructions issued by the Navy Department to the officer in charge of the station. The instructions read:

Regulations for
Tuckerton
station

In addition to complying with the provisions of the Executive Order of September 5, 1914, you will be guided by the following instructions relative to the operation of the Tuckerton Radio Station:

- (1) The station shall be used only for transmitting to or receiving from shore stations in Europe and the United Kingdom.
- (2) Naval officials at this station must assure themselves that the messages handled are strictly neutral in character. No unneutral message will be permitted to be handled.
- (3) No messages in cipher or code shall be transmitted or received for delivery unless the United States officials are furnished with a key to such messages.
- (4) No messages in foreign languages or in unintelligible terms shall be transmitted or received for delivery unless the United States Naval officials are supplied with translations of such messages in the English language and the official censors are satisfied of the *bona fides* of the translations.
- (5) Official radiograms from officials of the United States Government, or from officials of foreign governments on official (state) business, will have priority over all

other messages and will be forwarded in the order of sequence of their receipt at the station.

- (7) Radiograms involving press despatches will not be in any way different from other commercial or private radiograms.
- (11) No messages will be transmitted or delivered until they have been first paraphrased by the censors as may be necessary to ensure their neutral character, whether they are received or are to be sent in plain language or in code, cipher, or foreign language.
- (12) No messages shall be sent or delivered until countersigned by the censor.
- (15) Cipher and code books furnished as well as the contents of all messages handled will be considered as confidential.

On November 7, 1914 the Navy Department forwarded to the Department of State for its comment the following regulations and instructions, which it proposed to substitute for previous regulations governing radiocommunication which were then in force as a consequence of the President's Executive order of August 5, 1914:

1. Radio messages containing information relating to the location or movements of armed forces of any belligerent nation, or relating to material or personnel of any belligerent nation, will be considered as unneutral in character and will not be handled by radio stations under the jurisdiction of the United States, except in the case of cipher messages to or from United States officials.

2. No cipher or code messages are permitted to be transmitted to radio ship stations of belligerent nations by any radio shore station situated in the United States or its possessions or in territory under the jurisdiction of the United States. Similar messages received by such radio stations from ships of belligerent nations will not be forwarded or delivered to addressee.

3. No communication of any character will be permitted between any shore radio station under the jurisdiction of the United States and warships of belligerent nations except calls of distress, messages which relate to the weather, dangers of navigation or similar hydrographic messages relating to safety at sea.

4. No cipher or code radio message will be permitted to be sent from or received at any radio station in the United States via any foreign radio station of a belligerent nation, except from or at certain stations directly authorized by the Government to handle such messages. Press items in plain language relating to the war, with the authority cited in each item, will be permitted between such stations, provided no reference is made to movements or location of war or other vessels of belligerents.

5. No radiogram will be permitted to be transmitted from any shore radio station situated in the United States or under its jurisdiction to any ship of a belligerent nation or any shore radio station that in any manner indicates the position or probable movements of ships of any belligerent nation. Similar radiograms in the reverse direction will not be forwarded for delivery.

6. Code or cipher messages are permitted between shore radio stations entirely under the jurisdiction of the United States and between United States shore stations and United States or neutral merchant vessels, provided they are not destined to a belligerent subject and contain no information of any unneutral character, such as the location or movements of ships of any belligerent nations. In such messages no code or cipher addresses will be allowed and all messages must be signed with the sender's name. Radio operating companies handling such messages must assure the government censor as to the neutral character of such messages. Such messages, both transmitted and received, must be submitted to the censor at such times as he may designate, which will be such that will not delay their transmission.

7. In general, censoring officials will assure themselves beyond doubt that no message of any unneutral character is allowed to be handled.

8. In order to insure that censors may, in all cases, be informed thoroughly and correctly as to the contents of radio messages coming under their censorship, they will demand, when necessary, that such messages be presented for their ruling in a language that is understandable to them.

9. At such radio stations where the censor is not actually present at the station when messages are received by the radio station for forwarding either by radio or other means, messages may pass provided they are unmistakably of a neutral character, without being first referred to the censor, but the operating company will be held responsible for the compliance by their operators with these instructions.

The Department replied that from the point of view of American foreign relations no objection was then perceived to the proposed regulations.

The Acting Secretary of State (Lansing) to the diplomatic representatives of foreign governments, circular note of Sept. 22, 1914, MS. Department of State, file 811.741/43; the Secretary of the Navy (Daniels) to the Secretary of State (Bryan), Nov. 7, 1914, and Mr. Lansing to Mr. Daniels, Nov. 19, 1914, *ibid.* /84; 1914 For. Rel. Supp. 679-681.

In Aug. 1915 operation of the Sayville station was taken over by the Navy Department in the same manner as the Tuckerton station. See 1915 For. Rel. Supp. 888, n.

The proclamation of neutrality issued by the President of the United States upon the outbreak of war in Europe in September 1939 stated:

Proclamation
of neutrality,
1939

All belligerent vessels shall refrain from use of their radio and signal apparatus while in the harbors, ports, roadsteads, or

waters subject to the jurisdiction of the United States, except for calls of distress and communications connected with safe navigation or arrangements for the arrival of the vessel within, or departure from, such harbors, ports, roadsteads, or waters, or passage through such waters; provided that such communications will not be of direct material aid to the belligerent in the conduct of military operations against an opposing belligerent. The radio of belligerent merchant vessels may be sealed by the authorities of the United States, and such seals shall not be broken within the jurisdiction of the United States except by proper authority of the United States.

4 F.R. 3809, 3811.

Secretary Bryan, on January 20, 1915, stated as follows in a communication to Senator Stone, Chairman of the Committee on Foreign Relations, with reference to the allegation that the United States had been unneutral in enforcing a censorship of wireless messages and permitting freedom of communication by submarine cables:

The reason that wireless messages and cable messages require different treatment by a neutral government is as follows:

Communications by wireless can not be interrupted by a belligerent. With a submarine cable it is otherwise. The possibility of cutting the cable exists, and if a belligerent possesses naval superiority the cable is cut, as was the German cable near the Azores by one of Germany's enemies and as was the British cable near Fanning Island by a German naval force. Since a cable is subject to hostile attack, the responsibility falls upon the belligerent and not upon the neutral to prevent cable communication.

A more important reason, however, at least from the point of view of a neutral government, is that messages sent out from a wireless station in neutral territory may be received by belligerent warships on the high seas. If these messages, whether plain or in cipher, direct the movements of warships or convey to them information as to the location of an enemy's public or private vessels, the neutral territory becomes a base of naval operations, to permit which would be essentially unneutral.

As a wireless message can be received by all stations and vessels within a given radius, every message in cipher, whatever its intended destination, must be censored; otherwise military information may be sent to warships off the coast of a neutral. It is manifest that a submarine cable is incapable of becoming a means of direct communication with a warship on the high seas. Hence its use can not, as a rule, make neutral territory a base for the direction of naval operations.

Senator Stone to Secretary Bryan, Jan. 8, 1915, and Mr. Bryan to Mr. Stone, Jan. 20, 1915, MS. Department of State, file 763.72111/1435; 1914 For. Rel. Supp. viii. To the same effect, see the Counselor for the Department of State (Polk) to Representative Fitzgerald, Aug. 18, 1916, MS. Department of State, file 763.72111/3972a; 1916 For. Rel. Supp. 6-7.

See also arguments to similar effect previously advanced by the British and French Governments. The *Chargé d'Affaires* of Great Britain (Bar-

clay) to Mr. Bryan, Aug. 14, 1914, MS. Department of State, file 811.741/37; the Chargé d'Affaires of France (Clausse) to Mr. Bryan, telegram of Aug. 12, 1914, *ibid.* 763.72/353; 1914 For. Rel. Supp. 671-673.

In response to an inquiry from the American Ambassador in Chile in 1915, the Department of State explained that the United States did not censor cable messages, either code or plain, but that it did exercise censorship of radio messages and permitted neutral code radio messages to be sent where the codes were furnished to the censors. This regulation applied to both neutral and belligerent countries.

Secretary Bryan to Ambassador Fletcher, telegram of Jan. 14, 1915, MS. Department of State, file 825.731. See also 1915 For. Rel. 39.

. . . you are informed that no censorship of cable messages is exercised in this Country and the cable lines are open for the use of foreign governments as well as commercial houses and private individuals. You are advised, however, that the European terminals are owned or controlled by the Allied Governments which are at present enforcing a rigid military censorship over all messages transmitted by cable. Those Governments have indicated certain commercial codes which may be used when sending cable messages. The cable lines are also open for the use of the Allied Governments, which may transmit to and from this Country messages in code.

The Third Assistant Secretary of State (Phillips) to E. A. Purdy, Oct. 31, 1916, MS. Department of State, file 811.731/64. To similar effect, see the Third Assistant Secretary of State (Phillips) to G. L. Drury, Oct. 20, 1915, *ibid.* /56.

In January 1916 the German Ambassador explained to the Department of State that he was unable to continue his discussion of the *Lusitania* case because part of his instructions had not been delivered to him. In these circumstances, he requested the Department to transmit a cipher telegram to the German Foreign Office through the American Embassy; the Department complied.

Use of
official
channels

The German Ambassador (Von Bernstorff) to the Secretary of State (Lansing) and Mr. Lansing to Count von Bernstorff, Jan. 3, 1916, MS. Department of State, file 763.72/2342; 1916 For. Rel. Supp. 144.

. . . radio messages in code or cipher are only permitted to be exchanged between diplomatic missions in this country and their respective governments, and then only when copies of code or cipher used have been deposited with the naval officials in charge of the radio stations through which the message is to be sent or received. All other radio messages must be sent in plain English language.

Mr. Lansing to Count von Bernstorff, Jan. 26, 1915, MS. Department of State, file 811.741/269a; 1915 For. Rel. Supp. 883.

In reply to an inquiry from the German Embassy with reference to the use by that Embassy of the Tuckerton station for the transmission of code messages, the Department of State said that "in case the Imperial German Embassy desires to send wireless messages in code or cipher by means of this station the key to that cipher or code, as well as the plain messages in English, should be sent to this Department for transmittal to the authorities in charge of the Tuckerton station".

The Counselor of the German Embassy (Haniel von Haimhausen) to the Counselor for the Department of State (Lansing), Apr. 12, 1915, and Mr. Lansing to Mr. Haniel von Haimhausen, Apr. 17, 1915, MS. Department of State, file 811.741/159; 1915 For. Rel. Supp. 884.

For additional correspondence, including descriptions of the procedure followed in transmitting such messages, see 1915 For. Rel. Supp. 882-887, and the Secretary of State (Bryan) to the Ambassador to Germany (Gerard), telegram 2756, Mar. 1, 1916, MS. Department of State, file 763.72/2429; 1916 For. Rel. Supp. 183.

The Department of State instructed the Consul at Göteborg in February 1915 as follows:

**Commercial
messages**

... You may transmit private commercial cables when no other means available for forwarding, assuming no responsibility for delivery. Such cables must be strictly neutral; not relate to contraband or transfer of funds to belligerents; should be in plain language not cipher and sufficiently clear on face to be readily understood. Cost should be collected in advance from sender.

A similar instruction was sent to the Minister in the Netherlands on the same date.

The British Foreign Office transmitted the following communication in March 1915 to the American Ambassador in London:

Sir Edward Grey would point out that government messages such as those sent by the Department of State obtain priority over ordinary commercial messages and that this is an advantage which messages of the sort referred to should not enjoy over those of other traders.

He considers that His Majesty's Government can not be asked to agree to British cables being used for the purpose of facilitating commercial transactions with enemy countries.

Seven instances of the type of message referred to, out of a very large number which have passed through the censor's hands, are annexed. In spite of the prejudicial nature of their contents, all these messages have been forwarded to their destinations.

Another telegram which has just come into the hands of the censors is also annexed (No. 8). This message contains a request for the repetition, as government message, of telegrams connected with trade with the enemy which the censor has stopped.

In the circumstances, Sir Edward Grey does not feel that this telegram can properly be forwarded.

In reply the Department instructed the Ambassador:

... Department has to-day instructed all diplomatic and consular officers to discontinue forwarding private commercial messages until further instructions.

You may say to the Foreign Office that this Government understands that the objection of British Government to transmission of the commercial cables you mention and others of similar character is not based upon suspicion that they are in private code carrying concealed meaning, but that they are supposed to come within the rule established for the guidance of the British censor which is set forth in paragraph 6 of the Foreign Office memorandum of February 1 as follows:

"All cables are liable to be stopped which show clear evidence, either by the text of the telegram or by the known facts as to the sender or addressee, that they refer to a transaction, whether in contraband or non-contraband, to which a resident in an enemy country is one of the parties."

The difficulty is that in the application of this rule the censor has stopped many privately sent commercial cables which on the actual facts do not properly come under this rule. This Department has carefully and in good faith applied this rule to the private commercial cables which it has sent. The question in each case is one of fact, and a solution might be found by arranging for an investigation of the facts in doubtful cases.

The Secretary of State (Bryan) to the Consul at Göteborg (Sauer), telegram of Feb 26, 1915, MS. Department of State, file 841.731/344; Mr. Bryan to the Minister to the Netherlands (van Dyke), no. 112, Feb. 26, 1915, *ibid.* 199.1/104; Mr. Bryan to the Ambassador in London (Page), telegram 1280, Mar. 16, 1915, *ibid.* /114; 1915 For. Rel. Supp 709-712.

Referring to your note of March 26, 1915, with regard to the request of the Governor of British Honduras for information as to whether this Government would be willing to permit the sending of commercial messages by radio from that colony to addresses in the United States, through New Orleans, in code, under certain restrictions, I have the honor to inform you that this Government deems it inadvisable to grant the permission desired by the Governor of British Honduras. The transmission of commercial code messages between the United States radio stations and radio stations in foreign belligerent countries has not been permitted even in the case of the Tuckerton station operated under control of the Navy Department, and it is not considered advisable to make an exception to this rule in the case of radio stations in belligerent territory.

The Secretary of State (Bryan) to the British Ambassador (Spring Rice), no. 749, Apr. 21, 1915, MS. Department of State, file 811.741/155; 1915 For. Rel. Supp. 886.

In 1924, in view of the censorship maintained by the Brazilian Government during a revolution, the Department of State did not consider it proper to transmit to newspapers information of a purely political nature given by the newspapers' correspondents to the American Consul at Santos, Brazil, for transmission. The Consul was informed that messages regarding the status of American citizens and commercial interests had been transmitted to the interested parties after all information of a purely political character was deleted. Acting Secretary Grew to Consul Goforth, telegram of July 30, 1924, MS. Department of State, file 012.3 Vernon.

Chile

Decree 6364 of the Chilean Government, December 30, 1914, ordered that all telegraphic, radiotelegraphic, and telephonic apparatus, the installation of which had not been duly authorized, was to be destroyed and forbade all telegraphic cable or radiotelegraphic companies, either governmental or private, to transmit communications in code, except communications of diplomatic agents and banks, provided that their codes were deposited with the Director General of Telegraph. It was further ordered that all communications must be written in clear language—in German, Spanish, French, English, Italian, or Portuguese—and could not contain news regarding the position or movements of ships of belligerent nations. The preamble of the decree called attention to the radiotelegraph convention of London of July 5, 1912, in accordance with which it was stated that "wireless-telegraph offices not authorized by the Government can not exist in the territory of a State", and to articles 3 and 9 of Hague Convention V of 1907.

On January 25, 1915 the Chilean Government issued a new decree eliminating certain of the emergency restrictions on telegraphic communication. It provided:

The dispositions of Articles 2 and 3 of Decree No. 6364, of December 30 last, are modified in the following form:

1. The communications of diplomatic representatives and consular agents accredited in Chile can be transmitted and received in cipher or in code language without any restriction when there is reciprocity.

2. Private telegraphic communications, within the country or with neutral countries, may be exchanged in code language or cipher.

3. Private telegraphic communications, in cipher, with the belligerent countries may be made only by means of . . . [certain stipulated] codes . . . and those which the Government of Chile authorizes, providing that the sender gives to the corresponding administrative authority a translation of the telegram and he authorizes its transmission. . . .

4. Private telegraphic communications, in cipher or not, which contain notices regarding the situation, movements or operations of the war or merchant vessels of the belligerent nations may not be transmitted; but the agents of steam-

ship companies and commercial houses may transmit telegraphic communications in cipher or code language within the country or to neutral countries regarding the movement of steamers or merchant vessels.

[Translation.]

The Ambassador to Chile (Fletcher) to the Secretary of State (Bryan), no. 574, Jan. 11, 1915, enclosures, MS. Department of State, file 825.731/1; Mr. Fletcher to Mr. Bryan, no. 580, Jan. 30, 1915, enclosure, translation, 1915 For. Rel. 36-40.

The Minister in Uruguay informed the Department on October 26, 1914 that—

a number of secret installations for wireless telegraphy have been discovered and dismantled in the River Plate during the last fortnight, most of them in Buenos Aires and other places in Argentina and some in Montevideo. It would seem that these installations or most of them were owned by or in charge of Germans.

It is asserted that a chain of secret German radiographic stations are established along the South Atlantic coast from the Guianas to the Straits of Magellan.

Shortly thereafter the Minister forwarded to the Department copies of an Executive decree of October 20, according to which—

it is forbidden to establish without permission granted by the Executive private radiographic installations in Uruguay either on land or on Uruguayan vessels; which forbids vessels to use their apparatus for wireless telegraphy within the territorial or jurisdictional waters of Uruguay, except as provided in the dispositions adopted by the national authorities; and which contains rules and regulations to be observed by private corporations or persons who may desire to establish and operate stations for wireless telegraphy in this Republic.

Minister Grevstad to Secretary Bryan, nos. 757 and 761, Oct. 26 and 28, 1914, MS. Department of State, file 763.72111/854, /855; 1914 For. Rel. Supp. 691-692.

The Colombian Legation in Washington sent a memorandum to the Department of State on November 13, 1914 which read, in part, as follows:

The annexed copies or abstracts of Executive decrees tell by themselves how the Colombian Government has acted and in fact succeeded to prevent the use of radio stations for unneutral purposes. The decrees are:

A. August 22. Providing for dismantling of radio apparatuses on board the ships during their stay in Colombian waters.

- B. September 1. Subjecting stations to censorship.
- C. September 11. Closing Cartagena station for alleged transgressions.
- D. September 17. Contract with an expert for the operation of the station, with stringent clauses.

Complaint having been made by the French and British Governments that the Colombian Government was not enforcing its neutrality proclamation and that the Germans were making use of wireless stations, the Colombian Government explained:

We have no wireless stations on the Pacific Coast.

As for the Atlantic, Cartagena radio station that belongs to a private company, the Government has a contract giving it full rights of inspection and censorship in case of war.

The British Legation made reclamations on the ground that there was no characterized expert, and the Government to comply with the Legation's wishes closed the station.

Afterwards, the Government entered into an agreement with a professional expert, paid by the Government and put him at the head of the station which was again opened.

The British Legation after some days asked the dismissal of the German employees in the station, and although the Government's expert is the only one who receives or transmits radiograms, it decided to dismiss and did dismiss foreign employees, and since then operates the station, handing its net produces [proceeds] to the company.

No codes are admitted.

Now the British Legation considers that even plain words and phrases are suspect as they may be used with a conventional secret sense and on that new ground has asked the Government to close again the station.

But as the company has rights not to be overlooked, the Government cannot comply with the Legation's wishes, still less when it has its own expert operating the station. This is the only pending question.

The British Legation informed that it feared Germans may be hidden in Urabá using occult stations. The Government made investigations at Cartagena, at Turbo and at Quibdó and found an abandoned ship, the *Oscar*, of the Compañía Bananera, with wireless apparatus out of use. A special official was sent to bring back the apparatus.

The British Legation tendered its thanks to the Government for its zeal.

Memorandum from the Colombian Legation to the Secretary of State, Nov. 13, 1914, MS. Department of State, file 763.72111/645; the Secretary of State (Bryan) to the Chargé d'Affaires in Colombia (Harrison), telegram of Nov. 14, 1914, *ibid.* /615; the Colombian Government to the Colombian Legation in Washington, telegram of Nov. 15, 1914, *ibid.* /680; 1914 For. Rel. Supp. 685-687.

In a despatch of October 7, 1914 the Ambassador in Brazil stated: **Brazil**

It is not unfair to assume that the wireless installation on board the German merchant vessels in Brazilian ports has transmitted much information to German warships. The Brazilian authorities have attempted to stop this practice but have only partially succeeded. Under the regulations in force, belligerent merchant vessels in harbor can only use their wireless apparatus during the first forty-eight hours of their sojourn. After this period the apparatus must be disconnected and the operating cabins sealed. The Government wireless stations on land during the last month have been forbidden to transmit code messages. The Western Telegraph Company will only accept cablegrams *en clair* in the English and French languages, code addresses not being allowed.

Ambassador Morgan to Secretary Bryan, no. 466, Oct. 7, 1914, MS. Department of State, file 763.72111/534; 1914 For. Rel. Supp. 683-685.

A Commission of Jurists was created pursuant to a resolution adopted on February 4, 1922 by the Conference on the Limitation of Armaments held in Washington, to consider and report on the revision of the rules of warfare. The Commission was composed of representatives of the United States, Great Britain, France, Italy, Japan, and Netherlands. It agreed upon 12 articles concerning the control of radio in time of war, but the rules were never brought into force. **Commission of Jurists**

The American Delegates on the Commission of Jurists (John Bassett Moore and Albert Henry Washburn) to the Secretary of State (Hughes), Feb. 26, 1923, MS. Department of State, file 700.00116/129; 1923 For. Rel., vol. I, pp. 69-73. For complete text of the report, see *Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare* (The Hague, 1923) 230, 231; Gt. Br., Parliamentary Papers, Miscellaneous No. 14 (1924), Cmd. 2201. On the general subject, see Francis Colt de Wolf, "Telecommunications and Neutrality", in 30 A.J.I.L. (1936) 117-123.

The rules read as follows:

"ARTICLE 1

"In time of war the working of radio stations shall continue to be organised, as far as possible, in such manner as not to disturb the services of other radio stations. This provision does not apply as between the radio stations of opposing belligerents.

"ARTICLE 2

"Belligerent and neutral Powers may regulate or prohibit the operation of radio stations within their jurisdiction.

"ARTICLE 3

"The erection or operation by a belligerent Power or its agent of radio stations within neutral jurisdiction constitutes a violation of

neutrality on the part of such belligerent as well as on the part of the neutral Power which permits the erection or operation of such stations.

"ARTICLE 4

"A neutral Power is not called upon to restrict or prohibit the use of radio stations which are located within its jurisdiction, except so far as may be necessary to prevent the transmission of information destined for a belligerent concerning military forces or military operations and except as prescribed by article 5.

"All restrictive or prohibitive measures taken by a neutral Power shall be applied impartially by it to the belligerents.

"ARTICLE 5

"Belligerent mobile radio stations are bound within the jurisdiction of a neutral State to abstain from all use of their radio apparatus. Neutral Governments are bound to employ the means at their disposal to prevent such use.

"ARTICLE 6

"1. The transmission by radio by a vessel or an aircraft, whether enemy or neutral, when on or over the high seas of military intelligence for the immediate use of a belligerent is to be deemed a hostile act and will render the vessel or aircraft liable to be fired upon.

"2. A neutral vessel or neutral aircraft which transmits when on or over the high seas information destined for a belligerent concerning military operations or military forces shall be liable to capture. The Prize Court may condemn the vessel or aircraft if it considers that the circumstances justify condemnation.

"3. Liability to capture of a neutral vessel or aircraft on account of the acts referred to in paragraphs (1) and (2) is not extinguished by the conclusion of the voyage or flight on which the vessel or aircraft was engaged at the time, but shall subsist for a period of one year after the act complained of.

"ARTICLE 7

"In case a belligerent commanding officer considers that the success of the operation in which he is engaged may be prejudiced by the presence of vessels or aircraft equipped with radio installations in the immediate vicinity of his armed forces or by the use of such installations therein, he may order neutral vessels or neutral aircraft on or over the high seas:

"1. to alter their course to such an extent as will be necessary to prevent their approaching the armed forces operating under his command; or

"2. not to make use of their radio transmitting apparatus while in the immediate vicinity of such forces.

"A neutral vessel or neutral aircraft, which does not conform to such direction of which it has had notice, exposes itself to the risk of being fired upon. It will also be liable to capture, and may be condemned if the Prize Court considers that the circumstances justify condemnation.

"ARTICLE 8

"Neutral mobile radio stations shall refrain from keeping any record of radio messages received from belligerent military radio stations, unless such messages are addressed to themselves.

"Violation of this rule will justify the removal by the belligerent of the records of such intercepted messages.

"ARTICLE 9

"Belligerents are under obligation to comply with the provisions of international conventions in regard to distress signals and distress messages so far as their military operations permit.

"Nothing in these rules shall be understood to relieve a belligerent from such obligation or to prohibit the transmission of distress signals, distress messages and messages which are indispensable to the safety of navigation.

"ARTICLE 10

"The perversion of radio distress signals and distress messages prescribed by international conventions to other than their normal and legitimate purposes constitutes a violation of the laws of war and renders the perpetrator personally responsible under international law.

"ARTICLE 11

"Acts not otherwise constituting espionage are not espionage by reason of their involving violation of these rules.

"ARTICLE 12

"Radio operators incur no personal responsibility from the mere fact of carrying out the orders which they receive in the performance of their duties as operators."

The Embassy in London informed the Department of State in August 1914 that under British censorship regulations only messages passing between diplomatic missions and the American Government at Washington could be sent in cipher and that all other cable messages must be in plain language.

Belligerent
interference

Ambassador Page to Secretary Bryan, telegram 493, Aug. 27, 1914, MS. Department of State, file 841.731; 1914 For. Rel. Supp. 506.

As a result of representations made to the British Government under instruction of the Department of State with reference to protests of the Western Union Telegraph Company that British cable censorship regulations relating to address and signature of messages were curtailing the use of the cables and increasing the cost to the public, the Department was informed by the American Embassy, on Oct. 30, 1914, that private individuals would be allowed to use registered cable addresses in cables sent to Great Britain and also that signatures could be abbreviated but must unmistakably indicate the source. The Secretary of State (Bryan) to the Ambassador in London (Page), telegram of Aug. 15, 1914, MS. Department of State, file 841.731/18; Mr. Page to Mr. Bryan, no. 419, Aug. 24, 1914, *ibid.* /6 (enclosure); Mr. Page to Mr. Bryan, telegram 945, Oct. 30, 1914, *ibid.* /55; 1914 For. Rel. Supp. 505-506, 508, 513.

**Suppression
of messages**

The question of the stoppage and detention of commercial telegrams between the United States and Europe has been brought before the British Government by the United States Ambassador.

About 50,000 commercial telegrams a day pass through the commercial cables censorship. Of these a small number have been delayed or stopped owing to the fact that there has been reason to suspect that political and military news has been conveyed to belligerent countries by means of concealed codes.

The following arrangement has been communicated to the United States Ambassador:

Whenever the date of the despatch and addresses of sender and destined receiver are given, the censor will inform the United States Ambassador in London whether the cable has been stopped and the reason for stopping it.

It is, however, to be observed that not all cables between Europe and the United States pass through the British censor.

The British Ambassador (Spring Rice) to the Secretary of State (Bryan), MS. Department of State, file 841.731/170; 1914 For. Rel. Supp. 530-531. For prior correspondence regarding the matter, see *ibid.* 509 *et seq.*

On January 8, 1915 the Ambassador in London informed the Department of State that the stopping of commercial cables continued "in perhaps a slightly diminished number, but from forty to sixty a day are stopped out of perhaps ten thousand" and that the chief cause given by the British authorities was "suspicion of technical terms." The Department endeavored to inform all protestants, including the larger cotton exchanges and commercial organizations throughout the country, that plain English words must be used in cable messages. On January 20, 1915 the Ambassador informed the Department of State that—

Stoppage of cables has been somewhat, though not greatly, mitigated and I have little hope of further improvement for following reason: Practically all that are now stopped are stopped to prevent trading with the enemy. They are stopped not because of suspected ciphers but because they are about commercial transactions with Germans. The British own or control all cables from Great Britain to the Continent and they claim the right to cut them if they so choose or to deny their use in any way that would help the enemy. They forbid these cables to further enemy's trade on the same principle that they forbid the use of their ships. It is a war measure. Telegraphing to Germany or to neutral countries which promotes trade with Germany must therefore be done by some other than British cables if there be any other.

The Department instructed the Ambassador on January 21, 1915, that the holding up of commercial telegrams between Denmark and the United States was inflicting great hardship and that he should

bring the matter immediately to the attention of the Foreign Office. The Ambassador replied:

The censor endeavors to discriminate between telegrams concerning *bona-fide* neutral trade and telegrams that are suspected of promoting trade with enemy. The first class they pass. The latter class are stopped as a war measure. Since British own or control cables to Denmark they inform me that they would be within their rights if they stopped all telegrams or cut the cables as we did in our war with Spain. . . . Their cable lines they regard as one weapon and they [are] so using them.

On January 28 the Ambassador telegraphed that he had been informed by the British Government that Meyer's Atlantic cotton code (39th ed.) might be used in telegrams between the United Kingdom and any country on the extra-European telegraph system, not including the British colonies. In a telegram of February 1, 1915 he stated:

Their action is a war measure. Unless our past action under similar conditions permits us to go further than merely to ask a change of the rule as a favor or unless they are acting beyond their clear rights in the premises, I do not see what more we can do than to remind them of the hardships we suffer.

Ambassador Page to Secretary Bryan, telegrams 1437 and 1495, Jan. 3, and 20, 1915, MS. Department of State, file 841.731/218, /266; Mr. Bryan to Mr. Page, telegram 1007, Jan. 21, 1915, *ibid.* /268; Mr. Page to Mr. Bryan, telegrams 1514, 1541, and 1570, Jan. 22 and 28 and Feb. 1, 1915, *ibid.* /279, /295, /308. See also 1915 For. Rel. Supp. 699, 701, 702, 708. On the general subject, see *ibid.* 707-708, 712-713.

With reference to the alleged interruption by the British censors of strictly commercial cablegrams pertaining to non-contraband goods exchanged between the United States and other neutral countries, His Majesty's Government announce that an enquiry just completed into a batch of 60 or 70 telegrams forming part of some 350 submitted by the United States Ambassador in January has established the fact that only 3 were stopped by the British censor.

The present rule is that senders of stopped telegrams are only notified if their telegrams have been stopped for technical breaches of the censorship regulations, such as omission of the sender's name, insufficient address, etc. If telegrams are stopped because they are of a prejudicial nature, it is obviously undesirable to warn senders immediately.

The British Ambassador (Spring Rice) to the Secretary of State (Bryan), memorandum, Feb. 19, 1915, MS. Department of State, file 841.731/392; 1915 For. Rel. Supp. 708.

On June 26, 1915 the British Government gave notice that, under certain circumstances, it would inform the senders of telegrams detained by the British censors, and the whole or a part of the charges paid for trans-

mission would be refunded. This arrangement applied only to telegrams forwarded on or after June 15, 1915. For the arrangement, see the Ambassador in London (Page) to the Secretary of State (Lansing), no. 1711, June 30, 1915, MS. Department of State, file 841.731/707 (enclosure); Mr. Page to Mr. Lansing, no. 2087, Sept. 1, 1915, *ibid.* /943 (enclosure); 1915 For. Rel. Supp. 721-722, 724-725.

The following memorandum from the British Foreign Office was transmitted to the American Embassy in London on November 24, 1915:

Sir Edward Grey had on several previous occasions, at the request of the United States Government and of other neutral governments, caused an enquiry to be made with regard to a large number of telegrams, in spite of the fact that His Majesty's Government had, in the notification issued through the International Bureau at Berne ["under Article 8 of the international telegraph convention and Article 17 of the international radio-telegraph convention"] at the beginning of the war, expressly safeguarded themselves, as was their right by treaty, against giving information with regard to telegrams sent over British-controlled cables.

Sir Edward Grey . . . is bound to attach importance to upholding the principle that His Majesty's Government are not called upon to give explanations to private individuals, whether of British or foreign nationality, of the grounds for interference with telegrams passing over British-controlled cables.

Ambassador Page to Secretary Lansing, Nov. 29, 1915 (enclosure), MS. Department of State, file 841.731/1244; 1915 For. Rel. Supp. 728-729. See further, on the subject of the British refusal to give reasons why specific telegrams were not passed by British censors, Secretary Lansing to Ambassador Page, Jan. 19, 1916, MS. Department of State, file 841.731/1232; 1915 For. Rel. Supp. 730-731.

For correspondence of 1920 and 1921 between the United States and Great Britain regarding alleged interference by the British authorities with cablegrams to and from the United States, see 1920 For. Rel., vol. II, pp. 899 *et seq.* See also *Correspondence Respecting Alleged Delay by British Authorities of Telegrams to and from the United States*, Gt. Br., Parliamentary Papers, United States No. 1 (1921), Cmd. 1230.

For correspondence between the American and French Governments on the censorship of commercial telegrams and notification to the senders, see 1915 For. Rel. Supp. 700-726.

Between
North and
South
America

As a result of correspondence in the early part of 1915 between the American and British Governments, the British Foreign Office stated that the British Government would pass all messages between North and South America sent via the United Kingdom but that such messages were liable in a certain degree to be held up by accident.

The Secretary of State (Bryan) to the Ambassador in London (Page), telegram 1107, Feb. 10, 1915, MS. Department of State, file 841.731/323; Mr. Page to Mr. Bryan, telegram 1694, Feb. 24, 1915, *ibid.* /385; Mr. Bryan to Mr. Page, telegram 1556, May 13, 1915, *ibid.* /561; Mr. Page to Mr. Bryan, telegrams 2179 and 2223, May 27 and June 3, 1915, *ibid.* /588, /604; 1915 For. Rel. Supp. 705-718.

The American Consul in Chefoo, China, informed the Department of State, in February 1938, that the local telegraph office, formerly the Chinese Government Telegraph Administration, at that time under Japanese control, refused to transmit commercial messages in code and that the cost of plain-language messages was prohibitive. The Department was requested to transmit a commercial code message to the New York office of an American firm. The Department replied:

One. The Department is not in position to transmit on behalf of private individuals any messages received in other than governmental codes, in consequence of which transmission to the New York office of the Rieser Company of the coded text contained in your telegram under reference must await the receipt from you of a true reading.

Two. It is the understanding of the Department that the procedure adopted at Shanghai in regard to coded commercial messages permits acceptance by telegraph administration of such messages if bearing a foreign consular seal or, in the case of large firms having numerous messages, if a consular letter is filed with the telegraph administration after the receipt by the consulate of a declaration by such firms that their messages will not contain military or political information.

Three. The Department desires that you orally and informally endeavor to arrange with the appropriate authorities at Chefoo a procedure no less satisfactory to American interests than that followed at Shanghai.

The Consulate subsequently transmitted the true meaning of the code message and stated that the telegraph office in Chefoo refused to transmit code messages on behalf of business houses under consular seal or any other guaranty and that he had requested the Embassy at Peiping to take the matter up with the Peiping Provisional Government. The Department transmitted the uncoded message to its destination.

The American Embassy in Peiping later informed the Department that the Japanese Embassy had stated that the Japanese military authorities intended to adopt at Chefoo the procedure followed at Shanghai, as soon as peace and order were restored at Chefoo.

Consul Allen to Secretary Hull, telegram of Feb. 15, 1938; Mr. Hull to Mr. Allen, telegram of Feb. 16, 1938; Mr. Allen to Mr. Hull, telegram of Feb. 17, 1938; the Chief of the Division of Far Eastern Affairs (Hamilton) to the Rieser Company, Inc., Feb. 18, 1938; the Counselor of Embassy

(Lockhart) to Mr. Hull, telegram of Mar. 4, 1938: MS. Department of State, files 393.115 Rieser Company, Inc. /5, /6, /7, /8, /9.

**Official
messages**

In 1914 official telegrams of the commander of the China expedition of the United States Army to the commanding general of the Philippine Department were interfered with by the Hong Kong censorship. On October 23, 1914 the Ambassador in London reported:

. . . This detention appears to have been due to the fact that it was not contemplated that such messages would pass through hands of British censors since there is a direct American cable from Shanghai to the Philippines. . . . British Government express regret at delay and will do everything possible to facilitate transmission of such messages, and in order to accomplish this suggest that signatures and addresses be given in full to indicate official character.

The Secretary of State (Bryan) to the Ambassador in London (Page), telegram 269, Oct. 6, 1914, MS. Department of State, file 841.731/33; Mr. Page to Mr. Bryan, telegram 892, Oct. 23, 1914, *ibid.* /52; 1914 For. Rel. Supp. 511-512. To similar effect, see Mr. Page to Secretary Lansing, nos. 2294 and 3563, Oct. 8, 1915 and Jan. 13, 1916, MS. Department of State, files 841.731/1060, /1231. See also 1915 For. Rel. Supp. 727, 730.

On April 6, 1917 President Wilson issued Executive Order 2585 stating that—

**U. S.
belligerency**

it is ordered by virtue of authority vested in me by the Act to Regulate Radio Communication, approved August 13, 1912, that such radio stations within the jurisdiction of the United States as are required for naval communications shall be taken over by the Government of the United States and used and controlled by it, to the exclusion of any other control or use; and furthermore that all radio stations not necessary to the Government of the United States for naval communications, may be closed for radio communication.

1917 For. Rel., Supp. 2, pp. 1230-1231.

For President Wilson's Executive Order 2729-A, dated Oct. 12, 1917, issued under authority of the Trading with the Enemy and the Espionage Acts, regarding the establishment of the Censorship Board, see 1917 For. Rel., Supp. 2, pp. 963, 966.

. . . United States censors do not exercise jurisdiction over transatlantic cables originating in or addressed to points in continental United States, but do have jurisdiction over messages in transit through continental United States for transatlantic points.

Secretary Lansing to Ambassador Page, telegram 5087, July 3, 1917, MS. Department of State, file 811.731/145; 1917 For. Rel., Supp. 2, p. 1236

At midnight on July 25, 1917 the United States began the censorship of all cablegrams passing over the Atlantic cables to, from, or in transit through the United States.

Secretary Lansing to Ambassador Page, telegram 5301, Aug. 15, 1917, MS. Department of State, file 811.731/208. For regulations issued by the Director of Naval Communications to become effective upon establishment of censorship over Atlantic cables, see 1 *Official Bulletin*, U.S., no. 64, July 25, 1917, p. 3; 1917 For. Rel., Supp. 2, pp. 1238 *et seq.*

On Mar. 27, 1918 the United States and Italy concluded a protocol relating to radio service between the two countries, there being no direct submarine cables connecting them. The protocol provided that each of the two countries should designate a wireless station of sufficient power to insure radiocommunication between the two countries, that each "will insure transmission by priority over all other messages between the two Countries of their official urgent messages", and that in principle radio grams regularly handled "shall be limited in character to official, political, military, or naval urgent communications", including "official government press information". Treaty Series 631-A; 3 Treaties, etc. (Redmond, 1923) 2707-2708. For correspondence relating to the conclusion of the protocol, see 1918 For. Rel., Supp. 2, pp. 844 *et seq.*

For the arrangements entered into between the United States and France for the construction in France of a high-powered radio station to assure communication between France and the United States, see 1918 For. Rel., Supp. 2, pp. 836 *et seq.* For correspondence with reference to the failure to agree upon the reciprocal use of the Annapolis and Lafayette radio stations for transmitting official messages, see 1921 For. Rel., vol. I, pp. 957 *et seq.*

Pursuant to a joint resolution of Congress approved July 16, 1918, President Wilson, on November 2, 1918, took possession and assumed control and supervision "of each and every marine cable system and every part thereof owned or controlled and operated by any company or companies organized and existing under the laws of the United States, or any State thereof, including all equipment thereof and appurtenances thereto, whatsoever, and all materials and supplies".

Proclamation, Nov. 2, 1918

40 Stat. 1872.

POSTAL COMMUNICATIONS

INTERNATIONAL ORGANIZATION

§359

The General Postal Union (now the Universal Postal Union) was established in accordance with the treaty signed at Bern on October 9, 1874. By its terms (article I) the countries concluding the treaty were to form "a single postal territory for the reciprocal exchange of correspondence between their post-offices". Article XV of the same treaty provided that there should be organized an International Office of the General Postal Union (now the International Bureau of the

Universal
Postal
Union
and Inter-
national
Bureau

Universal Postal Union). Subsequent agreements concerning the Universal Postal Union and the International Bureau were signed at Paris in 1878, at Lisbon in 1885, at Vienna in 1894, at Washington in 1897, at Rome in 1906, at Madrid in 1920, at Stockholm in 1924, at London in 1929, at Cairo in 1934, and at Buenos Aires in 1939.

19 Stat. 577, 584; 20 Stat. 734, 743; 25 Stat. 1339; 28 Stat. 1078; 30 Stat. 1629; 35 Stat. 1639; 42 Stat. 1971; 44 Stat. 2221; 46 Stat. 2523; 49 Stat. 2741; and 54 Stat. 2049

The International Bureau of the Universal Postal Union—

- (1) Collects, collates, and distributes information of all kinds concerning the international postal service and publishes a summary of the important facts relating to the internal postal administrations of all countries members of the Union;
- (2) Publishes a monthly review, entitled *L'Union Postale*, maps indicating postal airlines, both internal and international, a list of airlines and the countries served by them; has also published, and revises from time to time, an alphabetic dictionary of the post offices of the world;
- (3) Issues an annual statistical report on international postal transactions, maintains a directory of internal taxes affecting postal shipments, and develops cost figures on postal transactions on a comparative basis;
- (4) Audits accounts and makes awards in connection with disputes arising over international postal transactions;
- (5) Suggests necessary modifications in the international agreements and acts of the Congress of the Postal Union;
- (6) Cooperates closely with international railway, air, and telegraph organizations whose activities are of importance to the postal service.

The United States contributes an annual sum toward the expenses of the Bureau, the appropriations therefor being contained in the general appropriations for the Post Office Department.

American Delegations to International Conferences, etc. (Department of State Conference Ser. 45) 146-147.

For summaries of the background and development of the Universal Postal Union, see Reinsch, "International Unions and Their Administration", in 1 A.J.I.L. (1907) 579, 586-589; Sly, "The Genesis of the Universal Postal Union" (International Conciliation, no 233, Oct 1927).

The following seven acts were signed on June 28, 1929 at the Universal Postal Congress held at London:

- (1) Universal postal convention;
- (2) Insured letter and box agreement;
- (3) Parcel post agreement;
- (4) Money order agreement;

- (5) Agreement concerning the collection of accounts, etc., through the post;
- (6) Agreement regulating transfers of postal cheque accounts;
- (7) Agreement governing subscription to newspapers and periodicals through the post.

The United States signed only the principal convention.

Department of State, Treaty Information Bulletin, no. 1 (Oct. 1929), p. 26. The status of ratifications of the Universal Postal Convention and the subsidiary agreements is set forth in tables in *ibid.*, no. 14 (Nov. 1930), p. 16 and *ibid.*, no. 19 (Apr. 1931), p. 15.

The Tenth Congress of the International Postal Union, which held its inaugural session in Cairo on February 1st [1934], adjourned on March 20th. Tenth Congress, 1934

Of the 91 separate postal administrations which compose the Union, 85 were actually represented. . . .

. . . 1668 propositions were submitted to the Congress, of which not more than 3 per cent were adopted:

(1) A new International Postal Convention was signed on March 20, 1934.

(2) Despite great efforts of Great Britain and Switzerland to have a change made in the ratio of votes accorded to each power (which would have given Great Britain an additional vote) the proposal was defeated.

(3) The maximum chargeable for foreign letter postage was reduced from the equivalent of 37½ gold centimes to 35 centimes (i.e. 40 per cent in addition to the basic rate of 25 centimes, instead of 50 per cent).

(4) Transit rates have been reduced 20 per cent.

(5) The dimensions of all classes of mail have been made uniform throughout the world.

(6) Only first class foreign mail must bear a date stamp.

(7) All mail bags must have colored labels (e.g. red for registered mail, white for ordinary mail, etc.).

(8) The usual preparatory conference before the meeting of the main Congress has been abolished.

The Minister to Egypt (Fish) to the Secretary of State (Hull), no. 68, Apr. 28, 1934, MS. Department of State, file 883.00 General Conditions/36.

On January 25, 1940, the President approved the Universal Postal Convention, the Final Protocol, Regulations of Execution, Air Mail Provisions, and Final Protocol to the Air Mail Provisions, signed at Buenos Aires on May 23, 1939. According to the provisions of article 82 of the convention it will enter into force on July 1, 1940, and will remain in force indefinitely. Eleventh Congress, 1939

The United States did not sign or become a party to the following acts which were also signed at Buenos Aires on May 23, 1939: The Agreement on Insured Letters and Boxes; the Agreement on Parcel Post; the Agreement on Money Orders; the Agree-

ment on Postal Checks; the Agreement on Collection Orders; and the Agreement on Subscriptions to Newspapers and Periodicals.

Department of State, II *Bulletin*, no. 32, p. 149 (Feb. 3, 1940).

See also Department of State, Treaty Information Bulletin, no. 116 (May 1939), pp. 101-102, and the *Annual Report of the Postmaster General* (June 30, 1939) 30-32.

**Membership
in Universal
Postal Union**

Membership in the Universal Postal Union may be acquired by adherence to the Universal Postal Convention. The "countries" which are members include colonies as well as independent states.

"The countries between which the present Convention is concluded form, under the name of *Universal Postal Union*, a single postal territory for the reciprocal exchange of correspondence." Art. 1, Universal Postal Union Convention, May 23, 1939.

"Any country is permitted at any time to adhere to the Convention.

"Notice of the adhesion shall be given thru diplomatic channels to the Government of the Swiss Confederation and by the latter to the Governments of all the countries of the Union."

Art. 2, *ibid.*

The universal postal conventions have also provided that members of the Union maintaining postal relations with territories outside of the Union should serve as intermediaries for other members of the Union.

"*Exceptional relations.* Administrations which serve territories not comprised in the Union are bound to act as intermediary for the other Administrations. The provisions of the Convention and its Regulations are applicable to such exceptional relations." Art. 7, *ibid.*

With respect to the similar article 7 of the London convention of 1929 (46 Stat. 2523, 2530), Akzin wrote:

"This clause, while not interfering with any internal measures of the countries not included in the Union, which might restrict or even prohibit the exchange of correspondence between the inland and foreign countries, puts the members of the Union under the obligation to extend to transit correspondence all existing facilities. Inasmuch as France maintains postal relations with Lattaquich, as British India maintains them with the native states, the Laccadive Islands, Nepal, Bhutan, Oman, Kuwait, Tibet and Sin Kiang, as the Ceylon administration maintains them with the Maldive Islands, the U.S.S.R. with Mongolia, Tannu-Tuva, Sin Kiang and Manchukuo, Japan with Manchukuo, and China with Tibet, Inner Mongolia and Sin Kiang,—these territories are open for postal purposes to any member of the Union." Akzin, "Membership in the Universal Postal Union", in 27 A.J.I.L. (1933) 651, 674.

The Swiss Minister in Washington informed the Department of State in June 1931 that—

**Mandated
territories**

the French Government, acting under the powers granted to it by the acts determining the international situation of Syria and Lebanon, adheres in the name and on behalf of each of these two countries, to the International Postal Convention, signed at London on June 28, 1929, as well as to the agreements concerning letters and boxes with declared value, money-orders, and parcel post, also signed at London on the same date.

In admitting Syria and Lebanon to participation in the expenses of the Bureau of the International Postal Union, they will be placed in Class VII.

The Swiss Minister (Peter) to the Secretary of State (Stimson), June 2, 1931, MS. Department of State, file 571.A11/98 (translation).

Referring to your note of March 8, 1921, embodying the text of a communication from the German Government to the Swiss Government, presenting reasons why in the opinion of the German Government the Saar District should not be admitted into the Universal Postal Union as a separate member, I have the honor to inform you that it is pointed out by the postal administration of this Government that the Universal Postal Union is not a union of independent or sovereign nations, as the German Government would seem to think, but a union of separate postal administrations forming a single postal territory for the reciprocal exchange of correspondence, and that since the formation of the Universal Postal Union, the colonial possessions of various sovereign nations have been admitted to membership therein and have been represented in the congresses by accredited delegates with the same powers as those of the sovereign nations.

Saar
District

It is the belief of the postal administration of the United States that the question raised by the German Government is one that should have properly come before the Universal Postal Congress held at Madrid in October and November, 1920, in which Congress both the postal administration of Germany and the postal administration of the Saar District were represented by delegates.

The Assistant Secretary of State (Fletcher) to the Swiss Minister (Peter), Apr. 28, 1921, MS. Department of State, file 571.A1/101.

The Saar District became a member of the Universal Postal Union on Sept. 9, 1920 by adhering to the universal postal convention concluded at Rome on May 26, 1906, and accompanying agreements. Mr. Peter to Secretary Colby, Oct. 26, 1920, MS. Department of State, file 571.A1/98.

The Universal Postal Union was formed at the Congress of Berne in 1874. The United States was one of the original members. . . . Sovereignty is not a requirement of membership. Korea, the Philippines, India, and similar geographical areas are members, and are signatories of the various Conventions. . . .

Unrecognised
regimes

The most recent Universal Postal Congress was held in London in 1929. The Convention and Regulations adopted by this Congress and ratified by the Governments of the members of the Union are complete and supersede all Conventions and Regulations adopted by previous congresses. Virtually all civilized countries are signatories of this Convention. It was ratified by the Postmaster General of the United States and approved by the President in March, 1930, and went into effect on July 1, 1930.

. . . Soviet Russia is a member of the Union, had a representative at the Congress of London in 1929, and is a signatory of the Convention of 1930. It has been made clearly understood by the

United States, however, that association with Soviet Russia as a member of the Union and a signatory of the Convention have no political significance.

During the period immediately after the World War, American mails for Soviet Russia were taken over by the Soviet administration at the Polish border and Soviet mails for the United States were forwarded by Poland. No postal agreement existed between the United States and Soviet Russia and yet ordinary mail service continued. . . . Article 7 of the Convention of 1929 [provides]:

"The Administrations which serve certain territories not included in the Union will be bound to act as intermediary for the other Administrations. The provisions of the Convention and its Regulations are applicable to these exceptional relations."

Memorandum of the Division of Far Eastern Affairs, June 18, 1932, MS. Department of State, file 893.71 Manchuria/1.

In acknowledging the receipt of your note of November 2, 1939, advising, by direction of your Government, that the Government of the Reich through its Legation at Bern has notified the Swiss Government that the adherence of Germany to the Universal Postal Union Convention signed at Cairo on March 20, 1934, implies the adherence also of the Protectorate of Bohemia and Moravia, I have the honor to state that the Government of the United States of America does not recognize the claim of Germany to a protectorate over Bohemia and Moravia, perceiving the existence of no legal basis therefor.

The Counselor of the Department of State (Moore) to the Swiss Minister (Bruggmann), Dec. 16, 1939, MS. Department of State, file 571.A12/257.

Regional postal unions

A number of regional postal unions have been established.

"Restricted Unions. Special Agreements. The countries of the Union and, insofar as their legislation is not opposed to it, the Administrations, may establish restricted Unions and make special agreements among themselves concerning the subjects dealt with in the Convention and its Regulations, on the condition, however, that they do not introduce therein any provisions less favorable, for the public, than those which are provided for by those Acts.

"The same option is granted to the countries which participate in the Agreements and, as the case may be, to their Administrations, in regard to the subjects contemplated by those Acts and their Regulations."

Art. 5, Universal Postal Union Convention of Buenos Aires (May 23, 1939).

The [International] Office [of the Postal Union of the Americas and Spain] was established [at Montevideo] in 1911 [as the South American Postal Bureau] in accordance with the provisions of the convention of the First South American Postal Congress. The United States was not a party to this convention [32 Bulletin of the Pan American Union (1911) 691]. This Government, however, joined the Postal Union of the Americas and Spain in 1922

by becoming a party to the convention of the First Pan American Postal Union Congress, signed at Buenos Aires in 1921 (42 Stat. 2154). This convention was modified at Mexico City in 1926 [45 Stat. 2408] and at Madrid in 1931 (Conference Series 13, p. 18). Further changes were introduced at a congress held in Panama in 1936 (Conference Series 35, p. 45), and the instruments resulting from that congress were put into force by the United States on October 1, 1937.

American Delegations to International Conferences, etc. (Department of State Conference Ser. 45) 147.

"The powers and duties of the International Office at Montevideo are largely the same as those of the International Bureau of the Universal Postal Union. It serves as a liaison agency between the several countries, as a clearing house for information of general interest, and as an agency for the settlement of accounts. It is specifically charged with the duties of giving opinions on disputed questions and compiling statistics.

"The International Office is under the supervision of the government of Uruguay."

Schmeckebier, *International Organizations in Which the United States Participates* (1935) 278, 280.

For information concerning the Pan-African Postal Conferences, see MS. Department of State, file 571.D1 *passim*.

For the agreement of Oct. 12, 1936 on postal and telecommunications cooperation between Greece, Rumania, Yugoslavia, Turkey, and Czechoslovakia, see MS. Department of State, file 571.E1.

With respect to the Balkan postal union convention drawn up at the Second Pan-Balkan Conference at Istanbul in Oct. 1931, see MS. Department of State, file 571.C1/1-3.

POSTAL CONVENTIONS

§360

An act amending section 398 of the Revised Statutes (5 U.S.C. §372), approved on June 12, 1934, reads: Making and interpreting

For the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them, the Postmaster General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage or other charges on mail matter conveyed between the United States and foreign countries: *Provided*, That the decisions of the Postmaster General construing or interpreting the provisions of any treaty or convention which has been or may be negotiated and concluded shall, if approved by the President, be final and conclusive upon all officers of the United States.

48 Stat. 943. See S. Rept. 1133, 73d Cong., 2d sess.

Section 4028 of the Revised Statutes authorizes the Postmaster General to conclude arrangements for money-order exchanges "with the post departments of foreign governments, with which postal conventions have been, or may be, concluded".

"In Mr. McIntyre's memorandum of April 11, 1935, he requested me to advise you whether I know of any objection to your approval of a document signed by the Postmaster General in which he interprets Section 1 of Article 13 of the Universal Postal Union Convention of Cairo relating to an additional transportation charge for open mail articles. . . .

"Inasmuch as the Postmaster General's interpretation is made pursuant to authority granted by the law herein mentioned [Rev. Stat. 398, as amended] and relates to a matter which is peculiarly within the competence and jurisdiction of the Post Office Department, and since it is understood that the interpretation when made final and conclusive against all officers of the United States will not preclude appropriate consideration and adjustment of any possible conflicting interpretation by a foreign government, this Department is not aware of any objection to your approval of the interpretation."

Secretary Hull to President Roosevelt, Apr. 22, 1935, MS. Department of State, file 571.A12/94.

Ratification

After signature, the [postal] convention is transmitted to the State Department by the Postmaster General for ratification by the President. Postal conventions do not go to the Senate for its approval, but they receive the approval and ratification of the President in a short statement about four or five lines long. This statement is countersigned by the Secretary of State, and the seal is attached thereto in the State Department.

After such ratification the copy of the convention which is to be retained by the United States is transmitted by the State Department to the Postoffice Department, and the copy which is to be retained by the foreign government is transmitted to the representative of that government in this capital.

Memorandum of the Office of the Counselor for the Department of State, Apr. 9, 1914, MS. Department of State, file 811.7100/1.

The parcel-post convention concluded between Peru and the United States on May 28, 1906 (ratified by the President on May 29, 1906 and by the Peruvian Government on Aug. 3, 1906) contained no provision for the formal exchange of ratifications. On July 31 the Peruvian Government notified the American Minister to Peru of its readiness to proceed to the exchange of ratifications. The note was transmitted by the Department of State to the Postmaster General, who replied that, as there was no provision for the formal exchange of ratifications in the parcel-post conventions between the United States and other countries, the convention with Peru would be put into operation, pursuant to its terms, on Sept. 1, 1906. The Peruvian Minister of Foreign Affairs (Prado y Ugarteche) to the Minister to Peru (Dudley), July 31, 1906; the Acting Postmaster General to the Secretary of State, Aug. 31, 1906: MS. Department of State, file 449/1; Mr. Dudley to Señor Prado y Ugarteche, no. 392, Oct. 3, 1906, *ibid.* /3.

Ratifications of the parcel-post convention concluded June 15, 1906 by the United States and France were exchanged in conformity with article XVI of the convention. See § 516, *post.*

As you are aware the ratification by this Government of the Convention in question [Universal Postal Union convention signed at London in 1929] applies likewise to the Insular Posses-

sions of the United States of America other than the Philippine Islands.

The Postmaster General (Brown) to the Secretary of State (Stimson), July 11, 1930, MS. Department of State, file 571.A11/58. See also 29 Op. Att. Gen. 380 (1913).

GENERAL POSTAL RELATIONS

§361

In April 1911 the Department of State informed the Post Office Department with reference to the Mexican town of Agua Prieta, reported to be under the control of the insurgents, that—

Places under
insurgent
control

Inasmuch as under the rules of international law heretofore followed by this government, a foreign port in the hands of insurgents (except where ingress or egress from such port is physically prevented by blockade or otherwise by the parent government) is regarded as if it were still in the hands of the parent government and so open to the intercourse and commerce of other nations, it seems quite clear that this Government need not, under present conditions, take any note of the fact that the town of Agua Prieta is now in the hands of the Mexican insurgents who are proceeding to administer the government of that place. Therefore no legal reason is perceived that would make it improper to route the Mexican mail now, as formerly, through Agua Prieta, notwithstanding the fact that the place is now in the hands of the insurgents.

Secretary Knox to the Postmaster General (Hitchcock), Apr. 18, 1911, MS. Department of State, file 812.00/1351.

Referring to Señor de la Cueva's call at the Department this morning, when he . . . asked . . . whether Mexican mails routed through Ciudad Juárez could be delivered to the Mexican consul at El Paso, Tex., for distribution, I beg to inform you that . . .

This Government does not feel . . . that it has any legal basis for prohibiting the routing of mail through Ciudad Juárez [in the hands of insurgents] when that is the only point through which mails destined to that section of the country can be dispatched. Moreover, as it would be manifestly improper for a postmaster of a foreign country to exercise his functions within the territory of the United States, still more would it be improper for such functions to be exercised by a foreign consul; and accordingly mail pouches can not properly be delivered to a consul. I may add, however, that official mail addressed to officials of the established government can probably be delivered to a consul, and that if mail can reach its destination through any other point than Ciudad Juárez it may be so routed.

The Acting Secretary of State (Wilson) to the Mexican Ambassador (Crespo), Mar. 4, 1912, MS. Department of State, file 812.71/8a; 1912 For. Rel. 736.

Severance of
diplomatic
relations

. . . you submit the following inquiry: "In case of a break of diplomatic relations between Mexico and this country, what would be the status of our outstanding C.O.D.'s sent through the registered C.O.D. parcel post service to Mexico."

. . . the Department does not perceive that a break in diplomatic relations between the United States and a foreign country should have any effect on the legal status of a Postal Convention, between the two countries, of the kind here in question, or that it need necessarily affect the status of goods of the category to which you refer.

The Solicitor for the Department of State (Hackworth) to The Satisfactory Company, Jan. 22, 1927, MS. Department of State, file 811.71512/30.

Official
correspondence

. . . The [diplomatic] pouch is established for the safe carriage of the official correspondence of this Government and on that basis has a recognized status in international law and practice. A foreign government would certainly be within its rights to complain if the pouch were used habitually to carry the correspondence of private American companies or citizens. While this Government recognizes freedom of speech, it is not its function to impose its precepts on other governments of the world, nor is it a proper use of the diplomatic pouch to get out of the country correspondence containing matter which that government under its sovereign authority censors. As a rare exception, to help American companies in a purely business way, such as communicating data regarding bids which they wish to make on government contracts, the government occasionally authorizes the use of its pouches for such private correspondence in appropriate cases, but when this correspondence contains criticism of the foreign government concerned or discussion of its politics or policies, it is not a proper matter for inclusion in the pouch. The political reports of the Embassy to the Department are on an entirely different basis than those of a foreign company to its principals. When the corporation enters a foreign country it subjects itself to the rules and regulations of that country and this Government cannot aid in their evasion.

The Assistant Secretary of State (White) to the Ambassador to Peru (Dearing), no. 500, Mar. 31, 1933, MS. Department of State, file 051.23/82.

With respect to the contention that anything mailed by a consul, even when acting unofficially, was not subject to inquiry, the Department wrote that—

"circumspection should be exercised in claiming immunity for postal matter not obviously official. The department sedulously guards against needless extension of the privilege of immunity to include matter for private parties. Even had the addresse[e]s been in the United States and the book been sent hither in a dispatch bag, it would have been amenable to the postal, copyright, and tariff laws, and subject to examination upon being intrusted to the mails. The department, not having itself authority

to exempt private postal matter from the operation of law, can not depute to its subordinates any discretionary power in that regard." The Secretary of State (Root) to the Minister to Turkey (Leishman), no. 1020, Feb. 24, 1906; 1906 For. Rel., pt. II, pp. 1416-1417.

. . . Mr. Considine protests against the use made of the diplomatic franking privilege by the Spanish Embassy in this country. Franking
privilege

In reply to your communication I may say that Spain is a member of the Postal Union of the Americas and Spain and a party to the Convention signed at the Fourth Congress of that Union on December 22, 1936 at the City of Panama, Republic of Panama. This Government is also a party to this Convention. Article 13 of the Convention deals with the franking privilege mutually accorded by the contracting countries, and reads in part as follows:

"Article 13. *Franking Privilege.* 1. The contracting parties agree to grant the franking privilege, both in their domestic service and in the Americo-Spanish service:

"(b) To correspondence of members of the Diplomatic Corps of the signatory countries.

Secretary Hull to Senator Copeland, Mar. 7, 1938, MS. Department of State, file 701.5211/561.

I refer to your note of January 27, 1939, concerning the franking privileges applicable to Cuban consular offices in the United States under the terms of the current Postal Convention of the Americas and Spain [concluded at Panamá December 22, 1936]. As was mentioned in my acknowledgment of February 6, the Department of State communicated on this subject with the Post Office Department.

A reply has now been received from the Post Office Department which reads in part as follows:

"Under United States law enacted in pursuance of the provisions of Article 13 of the above-mentioned Convention, the franking privilege granted to the official correspondence of foreign consular officers in this country is applicable to such correspondence when addressed to the Government of the United States and is not applicable when the correspondence in question is addressed to the Governments of individual States.

"With reference to the registration fee required to be paid when official consular correspondence is sent by air mail under registration, attention is invited to Section 7 of Article 13 above referred to, which stipulates that the franking privilege provided by said Article is not applicable when the correspondence concerned is transmitted by air mail."

The Counselor of the Department of State (Moore) to the Chargé d'Affaires ad interim of Cuba (Barón), Feb. 17, 1939, MS. Department of State, file 811.713/107.

. . . you complain of the action of the Consul at Jerusalem in failing to forward to . . . customers in Palestine certain

**Letters
in bulk**

letters transmitted . . . in bulk by AIR MAIL to the Consulate General in Jerusalem for that purpose.

The Department . . . is of the opinion that the action taken by Consul Thiel in this matter is correct. . . . the Department is informed by the Post Office Department that the practice adopted . . . in forwarding these letters in bulk for the purpose of having them remailed by the Consulate General in Jerusalem is a violation of the postal regulations and, in particular, of the provisions of the Universal Postal Union Convention of London, dated June 28, 1930, Section 4 of which reads as follows:

"Letters shall not contain any letter, note or document having the character of actual personal correspondence addressed to persons other than the addressee or persons residing with the latter."

The Chief of the Commercial Office of the Department of State (Murphy) to the Adept Mercantile Trading Company, Inc., July 21, 1933, MS. Department of State, file 199.1/897.

**Dutiable
merchandise**

The importation of dutiable articles in the sealed mails coming from countries which are parties to the convention is prohibited by the articles of the Universal Postal Convention of Madrid, effective January 1, 1922.

Opinion of the Attorney General, Aug. 10, 1922, 33 Op. Att. Gen. 276, 277, citing *Cotzhausen v. Nazro*, 107 U.S. 215 (1882). See *United States v. Eighteen Packages of Dental Instruments*, 222 Fed. 121, 123-124 (E.D. Pa., 1915); and *United States v. Four Packages of Cut Diamonds*, 247 Fed. 354, 358 (S.D. N.Y., 1917), affirmed, 255 Fed. 314 (C.C.A. 2d, 1918), modified, 256 Fed. 305 (C.C.A. 2d, 1919).

**Forged
money
orders**

In December 1932 and January 1933 there were cashed in the United States 74 Cuban postal money orders in the amount of \$7,320, which were later found to be forged. The orders were made out on forms apparently stolen from a Cuban firm holding the contract for the printing of the forms, which was under bond. The forms were filled in and mailed by the conspirators in Cuba to their confederates in the United States to be cashed. After the orders had been cashed in the United States they were charged to the Cuban Postal Service and were returned to Cuba in the regular course with the statements of account. The Cuban postal authorities expressed the opinion that any reimbursement of the United States would have to come from damages collected from the culprits or from the printing firm. On trial in Cuba, five defendants were acquitted, and four (including a former postmaster) were convicted of falsifying money orders. The latter were sentenced to pay a fine of 5,000 pesos each or, in lieu thereof, to serve two years' imprisonment; it was further adjudged that they should pay jointly as indemnities \$1,800 to the Cuban State, \$2,400 to the Government of the United States, and

\$11,000 to the Broadway Trust and Savings Bank of Chicago. In the United States four persons, three of whom were Cubans, were arrested and convicted of participating in the crime. As a result of the arrest and conviction of one of these persons, \$625 was recovered. The United States urged the Cuban Government to make good the loss, stating that if "the conditions were reversed and genuine money order forms were stolen from the contractor in the United States, and no notice of the theft were furnished to the Cuban authorities, the United States Post Office Department states that it would promptly reimburse the Cuban Postal Service for the amounts of any such orders paid in good faith by post offices in Cuba, without awaiting the conviction of the conspirators or recovery from the contractor".

The Cuban Department of Communications declined to accept responsibility, contending that the Cuban Postal Administration had not been culpable, that it had taken all proper action upon discovery of the crime, and that under the convention for the interchange of postal money orders between Cuba and the United States signed June 29, 1908 "each Administration is liable for the payments made within its territory".

The Assistant Secretary of State (Welles) to the Ambassador to Cuba (Caffery), no. 1062, Oct. 27, 1936, and enclosed memorandum, MS. Department of State, file 237.11 Miranda, Rafael/79; the First Secretary of Embassy in Cuba (Matthews) to the Secretary of State (Hull), no. 9053, June 2, 1937, *ibid.* /90.

By an agreement signed Nov. 8 and 21, 1938 a clause was added to the money-order convention between the United States and Cuba, under which the paying administration is allowed credit for orders on stolen genuine forms paid before notice of the theft of such orders reaches the Post Office Department of that country. The Third Assistant Postmaster General (Black) to Mr. Hull, Feb. 15, 1940, *ibid.* /99.

The Embassy in Turkey informed the Department of State in December 1938 that the Turkish Post Office Department was contemplating the issuance of a series of stamps commemorating the one hundred and fiftieth anniversary of the Constitution of the United States and inquired whether there would be any possible objection to a design combining portraits of President Roosevelt and of the late President Atatürk. The Department instructed the Embassy as follows:

Portraits
on stamps

In connection with a similar case in which the Guatemalan Government expressed a desire to use the President's portrait in a series of stamps commemorating the one hundred and fiftieth anniversary of the United States Constitution, the Post Office Department pointed out that American laws prohibited the use of portraits of living individuals on our postage stamps and expressed the opinion that it would be preferable for the postal

authorities of other countries to adhere to the same rule in so far as the President was concerned. Before these views could be communicated to the Guatemalan Government, however, it had apparently made commitments for the printing and engraving of a stamp bearing the President's portrait and such a stamp was actually issued. Thereupon the Post Office Department, while adhering to its original views, stated that in view of the laudable purpose for which the stamps were to be issued the Guatemalan postal authorities should be free to select such designs as they considered appropriate, and that it would interpose no objection if those authorities desired to pay tribute to the President's efforts to promote peace and friendship among the American Republics.

In the present instance it is suggested that you inform the Turkish postal authorities that while American laws prohibit the use of the portraits of living individuals on our stamps, we sincerely appreciate the signal mark of friendship which motivates the proposal to use the President's portrait in conjunction with that of the late President Atatürk, and we therefore leave the decision entirely in the hands of those authorities.

Ambassador MacMurray to Secretary Hull, telegram 61, Dec. 5, 1938, and Acting Secretary Welles to Mr MacMurray, telegram 32, Dec. 9, 1938 MS. Department of State, file 867.713/9 For correspondence with Guatemala referred to above, see MS Department of State, file 814 713/10-19A

Arbitration of postal dispute

On December 28, 1925, the Swiss Postal Administration communicated to the American Post Office Department the arbitral award rendered by the Postal Administration of Hungary and the Postal Administration of Switzerland, in the dispute between Norway and the United States concerning the interpretation of Article 4 of the Universal Postal Convention, signed at Rome, May 26, 1906. . . .

The Rome Convention (Article 23) provides that "in case of disagreement between two or more members of the Union, as to the interpretation of the present convention or as to the responsibility devolving on an administration from the application of said Convention, the question in dispute is decided by arbitration. To that end, each of the administrations concerned chooses another member of the Union not directly interested in the matter." [35 Stat. 1639, 1661.] Since June, 1914, the American and Norwegian administrations had taken different views as to the amount of sea-transit charges due to Norway from the United States, for the conveyance of certain postal matter from Newcastle to Bergen, on the regular route, New York-Plymouth-Newcastle-Bergen. The difference was due to varying interpretations of Article 4, §3 of the Rome Convention. . . . The Norwegian Administration claimed to be entitled to payment at the rate of 4 francs per kilogram of letters and postcards, and 50 centimes per kilogram of other articles, according to Art. 4, §3, section 1, number 2, letter b of the convention, for the sea route from Newcastle to Bergen. The United States claimed, however, that according to Art. 4, §3, section 1, number 2, letter c, the total transit charge for the entire sea route from

New York to Bergen, via Plymouth and Newcastle, should be 8 francs per kilogram of letters and post-cards and 1 franc per kilogram of other articles, and that this total should be shared, according to the second paragraph of Art. 3, by the American and Norwegian administrations, being pro-rated according to the distances traversed. As the distance from New York to Plymouth is 3,000 nautical miles, and that from Newcastle to Bergen only 404 nautical miles, the latter calculation would be much more favorable to the United States.

. . . . A proposal of arbitration was made by the Norwegian office on May 7, 1923, and accepted by the United States on April 24, 1924. Norway chose the Swiss Administration to act as arbiter, and the United States chose the Hungarian Administration to act in that capacity. On October 22, 1924, the United States informed the Hungarian office that it would apply the award in a similar dispute between the United States on the one hand and Sweden and Denmark on the other hand.

. . . They [the arbitrators] reached the conclusion that the conveyance from Newcastle to Bergen was clearly a conveyance between "the ports of two States served by the same line of steamers," within the meaning of that language in Article 4, §3, section 1, number 2, letter b of the convention. The Norwegian Administration is clearly entitled to an indemnity. . . .

The arbitral sentence was that the Postal Administration of the United States pay the Postal Administration of Norway for the conveyance of closed mails from Newcastle to Bergen during the years 1914-1919, at the rate of 4 gold francs per kilogram of letters and post-cards and 50 gold centimes per kilogram of other articles. The arbitrators also directed, in accordance with Article XXXVII of the regulations for the execution of the Rome convention, that the United States should pay interest on the sums due at the rate of 5 per cent, per annum.

Hudson, "American-Norwegian Postal Arbitration", in 20 *A.J.I.L.* (1926) 534-536. The award is published by the International Bureau of the Universal Postal Union in 51 *L'Union Postale* (1926) 50-60.

MARITIME NAVIGATION

§362

International uniformity of maritime law has been secured in several respects by such measures as—

the International Rules of the Road (U.S.C., title 33, secs. 61-141), the International Convention for the Safety of Life at Sea (effective as to the United States, November 7, 1936), the Carriage of Goods by Sea Act (49 Stat. at L. (part 1) 1207) and similar acts in foreign countries, the International Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea (37 Stat. 1658, effective as to the United States, March 1, 1913), and the International Sanitary Convention (effective as to the United States, May 22, 1928), and by

the voluntary action of shipowners in the adoption of the York-Antwerp Rules with reference to General Average.

Secretary Hull to President Roosevelt, Apr. 27, 1937, MS. Department of State, file 585.7A2/510A.

Salvage and assistance

The Third International Conference on Maritime Law met at Brussels in 1910. On September 23, 1910 a convention for the unification of certain rules of law with respect to assistance and salvage at sea was signed. The ratification of the United States was deposited on June 25, 1913. On August 1, 1912 the President approved an act of Congress, 37 Stat. 242, bringing the law of the United States into harmony with the convention.

3 Treaties, etc. (Redmond, 1923) 2943; 37 Stat. 1658

"The convention on salvage makes few changes in our own or the British law . . ." Report of the American Delegation to Secretary Knox, Feb. 14, 1911, MS. Department of State, file 585.7A2/262; 1911 For. Rel. 14.

Under article 11 of the Brussels convention every master is bound, so far as he can do so without serious danger to his vessel, crew, and passengers, to render assistance to everyone found at sea in danger of being lost; but the owner of the vessel incurs no liability by reason of the master's disobedience to this provision. On the strength of this last rule, the owner of a steamer was held not liable to an individual whose plea for rescue was ignored by the master. *Warshauer v. Lloyd Sabaudo S.A.*, 71 F. (2d) 146 (C.C.A. 2d, 1934).

Collisions

There was also concluded at Brussels, September 23, 1910, a convention for the unification of certain rules with respect to collisions at sea, dealing with the legal consequences resulting from collisions. The United States signed this convention with reservations but has not ratified it.

Department of State, Treaty Information Bulletin, no. 21 (June 1931), pp. 22 *et seq.*; 103 Br. & For. St. Paps. (1914) 434.

For the changes in the law contemplated by the convention, see report of the American Delegation to Secretary Knox, Feb. 29, 1911, MS. Department of State, file 585.7A2/266; 1911 For. Rel. 17.

In recommending adherence by the United States, Secretary Hull wrote:

"When the convention was signed in 1910 by the duly authorized plenipotentiaries of twenty-four governments, including the United States, it represented a general compromise between the United States, Great Britain and the continental countries in regard to the principles that should govern the liability of vessels to each other and to cargoes in cases of collisions. Although the elements of the compromise were familiar, it was then wholly untried, and it was uncertain whether any of the signatory countries would adopt it. Since 1910 all of the signatory countries except the United States, Cuba and Chile have ratified or adhered to the convention and a number of non-signatory countries have adhered to it. It is now the law of all the important maritime nations except the United States." Secretary Hull to President Roosevelt, Apr. 27, 1937, MS. Department of State, file 585.7A2/510A.

"... The safety of navigation clearly involves common action on the part of the leading maritime States, for if, for instance, the vessels of one State followed one set of rules for the avoiding of collisions and the vessels of another State followed a different set of rules, the result would be chaos. This common action has been achieved mainly by the enactment by the different maritime States of similar or identical regulations, and only to a slight extent by the making of international conventions. . . . States possessing maritime flags had individually enacted laws concerning signalling, piloting, courses, collisions, and the like, which were applicable to vessels sailing under their flag on the open sea. Although every State could then legislate on these matters independently, there was a tendency during the second half of the nineteenth century to follow the lead given by Great Britain in the Merchant Shipping Amendment Act of 1862, with its 'Regulations for preventing Collisions at Sea,' and the Merchant Shipping Acts of 1873 and 1894. Moreover, the *Commercial Code of Signals for the Use of all Nations*, published by Great Britain in 1857, was adopted by all maritime States. In 1889 a conference of eighteen maritime States took place at Washington, which recommended a body of rules for preventing collisions at sea to be adopted by each State, and a revision of the *Code of Signals*. These regulations were revised in 1890 and 1900 in England, and, after some direct negotiations between the Governments, most maritime States made corresponding regulations. In pursuance of a recommendation of the Washington Radiotelegraph Conference of 1927 a new edition of the *International Code of Signals*, to be effective since 1934, was prepared, and an international standing committee was established under the British Board of Trade charged with the task of keeping the Code up to date." I Oppenheim's *International Law* (5th ed., by Lauterpacht, 1937) 477-478.

At a conference in Lisbon there was signed on Oct. 23, 1930 an agreement concerning maritime signals. 125 League of Nations Treaty Series 95; V Hudson, *International Legislation* (1936) 792. On the same date there was also concluded at Lisbon the convention concerning manned lightships not on their stations. 112 League of Nations Treaty Series 21; V Hudson, *op. cit.* 801. For the agreement for a uniform system of maritime buoyage, opened for signature at Geneva on May 13, 1930, see VII *idem* (1941) 308.

See also I Gidel, *Le droit international public de la mer* (1932) 358 *et seq.*

For the international rules for navigation at sea, as adopted by the United States, see 33 U.S.C. §§ 61-144.

On May 31, 1929 there was signed at London a convention for the safety of life at sea. It deals with the construction of vessels, life-saving appliances, fire protection, radiotelegraphy, distress signals, meteorological services, the North Atlantic Ice Patrol, inspection of vessels, and granting of certificates, with detailed regulations in annex I. Annex II contains regulations for preventing collision at sea, which the parties requested the British Government to present to the other Governments that had accepted the international regulations for preventing collisions at sea, so that they might be put into

Safety
at sea

force by national legislation. The United States ratified the convention in 1936, subject to three understandings.

4 Treaties, etc. (Trenwith, 1938) 5134; 50 Stat. 1121. See also *Report of the Delegation of the United States of America to the International Conference on Safety of Life at Sea, London, April 16-May 31, 1929* (Department of State Conference Ser. 1, 1929). For an amendment to the regulations, see 4 Treaties, etc. (Trenwith, 1938) 5350. For the Simla Rules (1931), adopted by certain governments in the Far East in lieu of provisions of the convention as between themselves in that region, see V Hudson, *International Legislation* (1936) 1003.

The convention of 1929 supersedes the convention for the safety of life at sea signed at London on Jan. 20, 1914, which the United States signed but did not ratify. 108 Br. & For. St. Paps. 283. See also Wheeler, "International Conference on Safety of Life at Sea", in 8 A.J.I.L. (1914) 758. The 1914 convention had not entered into force but had been adopted in part as municipal legislation in several states.

Load lines

In pursuance of the Joint Resolution (Public No. 69, 71st Congress) approved May 9, 1930, providing for participation by the United States in the International Conference on Load Lines, delegates with plenary powers were appointed by the President, to represent the United States at an International Conference which convened in London on May 20, 1930, for the purpose of formulating international rules and regulations for determining the load lines of merchant vessels engaged in international trade. The Conference closed its sessions on July 5, 1930, on which day the International Load Line Convention and an accompanying Final Protocol and a Final Act of the Conference were signed. . . . The Convention will become effective on July 1, 1932, among those Governments which ratify it by that date, provided five such ratifications shall have been deposited.

The Convention applies to all ships of one hundred and fifty gross tons, and over, engaged in international trade, although the Act of Congress to establish load lines for American vessels, approved March 2, 1929, and effective September 2, 1930 (45 Stat., Part 1, 1492) applies only to vessels of two hundred and fifty gross tons or over. Many of the countries represented require load lines for all sea-going vessels engaged in international trade, while there was no other country whose tonnage limit was as high as that of the United States. . . .

Provision has been made in Chapter II for existing ships already marked with load lines which were determined by the application of the 1906 rules of the British Board of Trade, or by other rules equivalent thereto, to retain their present load lines providing they comply in principle, and in detail so far as is reasonable and practical, with the provisions of the Convention.

In Chapter III provision has been made to limit the life of any certificate of assignment of load lines to a maximum period of five years. It is also provided that the same load lines may be continued by the renewal of such certificates, for additional

periods not exceeding five years each, after a survey not less effective than the original survey required for the original assignment. . . .

Chapter III also defines the control which may be exercised by any of the contracting governments over ships of the other contracting governments. This control assures that the ship is not loaded beyond the limits allowed by the load line certificate and that a ship does not leave port in a manifestly unsafe condition.

The technical rules for determining load lines are contained in Annexes 1 and 2 to the Convention. Zones and seasonal areas for the oceans of the world are defined, based upon the record of weather conditions, and load lines are provided to meet those conditions. The load lines determined by the rules conform to the established practice of safe loading as determined by actual conditions experienced in navigating the oceans. The rules are essentially in accord with the rules proposed by the United States Load Line Committee (1928) in its report to the Secretary of Commerce.

Chapter IV of the Convention authorizes the acceptance in substitution for particular fittings, appliances or arrangements required in ships by the Convention, of other fittings, appliances or arrangements equally effective.

It is agreed by the Final Protocol to exempt from the provisions of the Convention ships engaged solely on voyages on the Great Lakes of North America and existing ships of the United States and France of the lumber schooner type. It is also agreed in the protocol that on the request made at any time by the United States a conference shall be called of the Governments of the countries having tankers for a reconsideration of the rules which determine the load lines for tankers.

Secretary Stimson to President Hoover, Feb. 11, 1931, MS. Department of State, file 585.61B1/163. See also the Acting Secretary of State (Cotton) to the United States Delegation to the Load Line Conference, Apr. 29, 1930, *ibid.* /48; report of the Chairman of the United States Delegation (Walker) to President Hoover, Aug. 16, 1930, *ibid.* /121.

For the convention see 4 Treaties, etc. (Trenwith, 1938) 5287; 47 Stat. 2228. The ratification of the United States was deposited at London on June 10, 1931. For an amendment and minor alterations, see 4 Treaties, etc. (Trenwith, 1938) 5341-5350.

An act of Congress approved Mar. 2, 1929 (effective Sept. 2, 1930) conferred upon the Secretary of Commerce authority to establish load lines by regulations having the force of law. 45 Stat. 1492.

By a proclamation issued by President Roosevelt on Aug. 9, 1941 the convention was declared "suspended and inoperative in the ports and waters of the United States of America, and in so far as the United States of America is concerned, for the duration of the present emergency". Department of State, V. *Bulletin*, no. 111, pp. 114-115. See §511, vol. V, of this Digest.

A convention for the unification of certain rules relating to bills of lading for the carriage of goods by sea was opened for signature

Law of
maritime
carriage

at Brussels on August 25, 1924. Ratification by the United States was deposited on June 29, 1937. In giving its advice and consent to the ratification of the convention, the Senate expressed its understanding that the limit of liability within the United States on the part of the carrier or ship should be \$500, unless the nature and value of the goods had been declared by the shipper before shipment and inserted in the bill of lading; and also that, in case of conflict between the convention and the act of April 16, 1936, known as "the Carriage of Goods by Sea Act", 49 Stat. 1207, the provisions of the latter should prevail.

4 Treaties, etc. (Trenwith, 1938) 4935; 50 Stat. 1121.

In recommending the ratification of the convention, the Department of State said:

"The responsibilities and liabilities of carriers of goods by sea for loss or damage to cargoes, their duties and rights and the responsibilities and rights of shippers as at present governed by the laws of the several countries differ greatly. The purpose of the rules incorporated in this convention, which have been in preparation for a number of years, is to establish international uniformity in these matters on a basis fair to ocean carriers, cargo owners, insurers and bankers.

"The convention substantially in its present form was drafted at the fifth session of the International Conference on Maritime Law, held at Brussels October 17-26, 1922, at which twenty-four countries including the United States were represented by officially designated delegates. In the report which the delegates of the United States made of the proceedings of the conference, they strongly recommended the adoption of the rules contained in the convention. The 1922 draft was subsequently amended in a few minor particulars not affecting the general principles of the Rules, at a meeting of the Subcommittee of the Conference held at Brussels in October, 1923, at which the United States was represented.

"The Rules in the Convention cover the period of transit of goods by sea, namely from the time of loading on the vessel to the time of discharge therefrom. In so far as regards American overseas commerce it is intended that the existing law of the United States (the Harter Act of February 13, 1893, 27 Stat. 445), shall continue to govern liabilities between shippers and carriers before goods are loaded on a vessel and after they are discharged therefrom."

The Acting Secretary of State (Grew) to President Coolidge, Feb. 24, 1927, MS. Department of State, file 585.7A3/258. See also Secretary Hughes to the American Delegates to the International Maritime Conference at Brussels, Sept. 26, 1922, *ibid.* /23a; *Report of the Delegates of the United States to the International Conference on Maritime Law, Fifth Session, Brussels . . . 1922* (1923); Secretary Hughes to Norman B. Beecher, Sept. 28, 1923, MS. Department of State, file 585.7A3/123a.

On Aug. 25, 1924 there was also opened for signature at Brussels a convention for the unification of certain rules relating to the limitation of liability of owners of seagoing vessels. II Hudson, *International Legislation* (1931) 1332. At the same time there was also opened for signature

a convention for the unification of certain rules relating to maritime mortgages and liens. *Ibid.* 1360. This did not enter into force and was superseded by the convention on the same subject opened for signature at Brussels on Apr. 10, 1926. III *idem* 1845. The United States is not a party to these conventions. They likewise resulted from the International Conference on Maritime Law held at Brussels in 1922 and were the outgrowth of work of the International Maritime Committee.

The International Maritime Committee (*Comité Maritime International*) is a non-governmental organization founded in 1897 to promote the unification of maritime law by international conventions. It has established national associations in many states, holds periodic conferences, and publishes a bulletin and reports of its conferences. "These conferences had prepared draft Conventions which were successively adopted by the Diplomatic Conferences which met at Brussels in 1909, 1910, 1922, 1923 and 1928 respectively. The said draft Conventions (several of which have now become the law of the world) concerned: Collisions at Sea, Salvage and Assistance at Sea, Limitation of Shipowners' Liability, Maritime Mortgages and Liens on Ships, Immunity of State-owned Ships, exemption clauses in Bills of Lading (known as The Hague Rules)." League of Nations, *Handbook of International Organizations* (1938) 247. See also Franck, "A New Law for the Seas", in 42 L. Q. Rev. (1926) 25, 308.

With respect to the York-Antwerp Rules on general average, adopted by the International Law Association in revised form at Stockholm in 1924, see International Law Association, *Report of the Thirty-third Conference* (1925) 494-695; 3 American Maritime Cases (1925), *supp.*

A convention and statute on the international regime of maritime ports were opened for signature on December 9, 1923 at the Second General Conference on Communications and Transit at Geneva. The statute provides that on a basis of reciprocity the sea-going vessels of the parties shall enjoy freedom of access to and equality of treatment in their maritime ports. These it defines as "All ports which are normally frequented by sea-going vessels and used for foreign trade." The statute applies to "all vessels, whether public or private owned or controlled", except warships and other vessels exercising public authority and fishing vessels. It does not apply to the maritime coasting trade or cover the rights and duties of belligerents and neutrals in time of war.

Maritime
ports

58 League of Nations Treaty Series 285; II Hudson, *International Legislation* (1931) 1156, 1162. See also Laun, "Régime international des ports", *Académie de Droit International* (La Haye), 15 *Recueil des cours*, 1926, p. 5.

With respect to problems of health and sanitation arising in connection with travel by sea, see the inter-American sanitary convention signed at Habana on Nov. 14, 1924 and the additional protocol signed at Lima on Oct. 19, 1927, 4 *Treaties*, etc. (Trenwith, 1938) 4700, 4720; the international sanitary convention signed at Paris June 21, 1923, *ibid.* 4962. See also § 128 on quarantine, vol. II, ch. VI, of this Digest.

INLAND TRANSPORTATION

§363

**International
rivers**

In an article written in 1910, Hyde, after an examination of the practice of the United States concerning rivers in part traversing or bounding its own territory (Mississippi, St. Lawrence, Yukon, Porcupine, Stikine, Columbia, Colorado, and Rio Grande), concluded:

First, no right of navigation has been exercised in foreign territory or permitted in American territory except by virtue of a treaty.

Second, no treaty has declared it to be a principle of international law that international navigable rivers are generally open to navigation by vessels of foreign riparian or non-riparian states.

Third, the United States, as upstream proprietor, has on one occasion accepted a treaty the terms of which justify the contention that the right of navigation was conferred as a grant by the lower proprietor; and on others has made substantial concessions for the privilege of access to the sea.

Fourth, in two cases where the upper stream has passed wholly within the territory of a single state, no permission has been given to inhabitants of the lower to navigate the foreign waters.

Fifth, the right of a state to make all reasonable regulation for all navigation within its own territorial waters has been generally recognized.

Upon an examination of general practice, he concluded:

The practice of nations generally with respect to the navigation of international rivers has been based upon commercial necessity, and has, therefore, been shaped by geographical conditions rather than by any other. In North America since the Mississippi has become a national stream, but three countries, and in most discussions only the United States and Great Britain, have been interested in the navigation of their common rivers. European streams have been commercially important to several states, riparian and non-riparian, within relatively close proximity to each other. Freedom of navigation to vessels of commerce generally has been a natural consequence. Access to those rivers has, however, for geographical reasons been of relatively small consequence to maritime states of other continents.

South American rivers, on the other hand, . . . have afforded a sufficient and solitary channel of communication between the Atlantic and several states remote therefrom. For that reason freedom of navigation has been a matter of concern to oversea states, however distant. Such nations have, therefore, sought to secure freedom of navigation.

The practice of maritime states during the past century or more justifies the following conclusions:

First, that any right of navigation is dependent upon the consent of the territorial sovereign.

Secondly, that the law of nations imposes upon such sovereign the duty to yield its consent to the navigation of its own waters by the inhabitants of any other upstream riparian state.

Thirdly, that where a river and its tributaries afford the sole means of water communication between several riparian states and the ocean by reason of a channel of sufficient depth to be of general commercial value, it becomes the duty of any riparian state bordering the lower waters to consent to the free access to countries upstream by all foreign merchant vessels.

Fourthly, that in the absence of arrangement for international regulation, the territorial sovereign may exercise large discretion in the control of navigation within its own waters.

Hyde, "Notes on Rivers and Navigation in International Law", in 4 A.J.I.L. (1910) 145, 151, 154-155. See also Kaeckenbeeck, *International Rivers* (1918); Chamberlain, *Regime of the International Rivers: Danube and Rhine* (1923); Winiarski, "Principes généraux du droit fluvial international", Académie de Droit International (La Haye), 45 *Recueil des cours*, 1933, p. 75. For a bibliography of treaties, etc. governing the international use of inland waterways, see Ogilvie, *International Waterways* (1920) 175-380.

With respect to the status of various rivers in Europe, North and South America, and Africa, see vol. I, pp. 596-610, of this Digest.

With respect to the diversion of water from international rivers and their use for purposes other than navigation, see vol. I, pp. 580 *et seq.*, of this Digest. See also H. A. Smith, *Economic Uses of International Rivers* (1931).

The Conference of Barcelona, held under the auspices of the League of Nations in 1921, drew up a convention and statute on the regime of navigable waterways of international concern, which was opened for signature on April 20, 1921. The United States was not represented at the conference and is not a party to the convention. The convention constituted the "General Convention [to be] drawn up by the Allied and Associated Powers, and approved by the League of Nations" contemplated by article 338 of the Treaty of Versailles. The statute defines navigable waterways of international concern. With reservations as to *cabotage* and as to war vessels, each contracting party agreed to accord on such waterways "which may be situated under its sovereignty or authority" "free exercise of navigation to the vessels flying the flag of any one of the other Contracting States". The statute provides for equality of treatment in the exercise of the right of navigation. No dues may be levied except equitable dues in payment for services in maintaining and improving navigability. In the absence of special treaty provisions, navigable waterways are to be administered by each of the riparian states under whose sovereignty or authority they lie. Existing treaties were not to be abrogated by the statute and certain provisions were made concerning existing and future river commissions.

Developments
since World
War, 1914-18

7 League of Nations Treaty Series 35; I Hudson, *International Legislation* (1931) 638.

"As some of the States wished to go even further . . . an Additional Protocol of the same date was signed and ratified by certain States, whereby they grant to one another, 'on condition of reciprocity' and in time of peace, either (a) 'on all navigable waterways' (that is, presumably, rivers, canals, and lakes) or (b) 'on all *naturally* navigable waterways' (that is, presumably, rivers and lakes) under their sovereignty or authority and accessible to ordinary commercial navigation to and from the sea, perfect equality of treatment for the flags of any signatory State 'as regards the transport of imports and exports without transshipment.'

"*General.*—Thus the past decade has witnessed further and important applications of the principle of free navigation upon rivers, the essence of which is the admission of the flags of all States upon terms of equality and subject to the payment of such dues only as are equitably required for maintaining and improving the conditions of navigation. The principle cannot be described as a recognised rule of customary International Law, but the machinery now exists in the Barcelona Convention of 1921 whereby it is capable of becoming a world-wide principle of conventional International Law. Moreover, there now exists in the League Organisation for Communications and Transit an international body whose duty it is to safeguard and foster the principle. And it was under the auspices of the League and due largely to its Consultative Committee on Communications and Transit that a series of conventions relating to the unification of river laws was concluded in 1930."

I Oppenheim's *International Law* (5th ed., by Lauterpacht, 1937) 369-370.

A convention on the measurement of vessels employed in inland navigation was signed at Paris on Nov. 27, 1925 by representatives of 19 European countries, to become effective Oct. 1, 1927. 67 League of Nations Treaty Series 63; III Hudson, *International Legislation* (1931) 1808. This supersedes to some extent the convention on the same subject signed at Brussels on Feb. 4, 1898. 90 Br. & For. St. Paps. 308. See also additional articles of June 1, 1908, 101 *idem* 720. On Mar. 3, 1927, Belgium, France, Germany, and the Netherlands signed at Brussels a declaration relating to the recognition of certificates of measurement of vessels employed in inland navigation. XIX Martens' *Nouveau recueil général* (3d ser., 1929) 620; III Hudson, *International Legislation* (1931) 2076. Three conventions were concluded at the Conference on the Unification of River Law, held at Geneva from Nov. 17 to Dec. 9, 1930, in which 21 European countries participated. One of the conventions relates to the unification of certain rules concerning collision in inland navigation. V Hudson, *International Legislation* (1936) 815. Another is concerned with the registration of inland navigation vessels, rights *in rem* over such vessels, and other cognate questions. *Ibid.* 822. The third relates to administrative measures for attesting the rights of inland navigation vessels to a flag. *Ibid.* 848. See also Kuhn, "International Conference for the Unification of the Laws of River Navigation", in 26 A.J.I.L. (1932) 121.

Railways, etc.

. . . there are no treaties in force between the United States and Canada governing the operation of railway companies between the two countries. Through trains which run from American to Canadian cities operate in pursuance of private agreements between the roads themselves, subject of course to the approval of the appropriate regulatory bodies in the two countries.

There are also no treaties between the United States and Canada in respect of telephone, telegraph and express services across the international boundary. Permits are issued by the respective Governments for telephone and telegraph companies connecting the two countries and it is understood that there are working arrangements between companies operating in the United States and companies in Canada for the transmission of messages. The situation with regard to express service is similar to that of railway transportation.

The Acting Chief of the Division of Western European Affairs (Gilbert) to E. D. Fite, Mar. 14, 1930, MS. Department of State, file 811.7742/4.

At the Second General Conference on Communications and Transit held in Geneva there was concluded, on Dec. 9, 1923, a convention on the international regime of railways. Many European and non-European states (not including the United States) are parties. This convention and the annexed statute deal with general principles governing the interchange of international rail traffic, reciprocity in the use of rolling stock, relations between railways and their users, rates and fares, and financial arrangements between railway administrations with respect to international traffic. 47 League of Nations Treaty Series 55; II Hudson, *International Legislation* (1931) 1180.

A convention on the transport of goods by rail was signed at Bern on Oct. 23, 1924. II Hudson, *International Legislation* (1931) 1393; XIX Martens' *Nouveau recueil général* (3d ser., 1929) 476. This convention replaces the Bern convention of Oct. 14, 1890. 82 Br. & For. St. Paps. (1889-90) 771; XIX Martens' *Nouveau recueil* (2d ser., 1895) 289. A revised convention on the transport of goods by rail was opened for signature at Rome on Nov. 23, 1933. VI Hudson, *International Legislation* (1937) 527. On Oct. 23, 1924 there was concluded at Bern a convention on the transport of passengers and luggage by rail. II Hudson, *International Legislation* (1931) 1468; XIX Martens' *Nouveau recueil général* (3d ser., 1929) 558. A revision of this convention was opened for signature at Rome on Nov. 23, 1933. VI Hudson, *International Legislation* (1937) 568. See also Brunet, Durand, and De Fourcauld, *Les transports internationaux par voie ferrée* (1927).

With respect to the international organization of transportation by European railways and the agreements thereon, see Masters, "International Organization of European Rail Transport" (*International Conciliation*, no. 830, May 1937), pp. 487-544; see also Reinsch, "International Unions and Their Administration", in 1 A.J.I.L. (1907) 579, 589-593.

"The International Railway Commission was established in accordance with a resolution of the First International Conference of American States which met in Washington in 1889. This Commission was established for the purpose of determining the feasibility of an international railway from New York to Buenos Aires, Argentina. The Commission made surveys, the results of which were published in seven volumes in 1898. The Fifth International Conference of American States which met in Santiago, Chile, in 1923 authorized the reorganization of the Commission and named it the Pan American Railway Committee. As reorganized the Committee consists of seven members, with a national section in each country through which the railway is to run.

"The Committee has submitted a report to each of the conferences of American states held since its constitution and is continuing its efforts with a view to the eventual completion of the inter-American railway, of which, at the present time, approximately 7,000 miles have been constructed."

American Delegations to International Conferences, etc. (Department of State Conference Ser. 45) 120-121. See also Pan American Railway Committee, *Report Submitted . . . to the Sixth International Conference of American States* . . . (1927); Santiago Marín Vicuña, *El Ferrocarril Inter-continental Pan-americano—Su estado actual* (1933).

**Proposed
Canadian-
American
railway
treaty**

In 1910 the chairman of the Interstate Commerce Commission of the United States and the chairman of the Railway Commission of Canada proposed a draft treaty with respect to railway rates and regulations between the United States and Canada. In submitting the proposed treaty to the Department of State, they wrote:

1. It is quite apparent that the existing laws of the United States and of Canada are inadequate for the effective control of international carriers, as respects through rates and the establishment of through routes and other matters which are proper subjects of joint regulation, and that such regulation would be mutually advantageous to the interests of both countries. It is equally plain that the regulation to which international carriers should be subjected is substantially similar to that provided for interstate carriers of the United States under the substantive provisions of the amended act to regulate commerce, as the same are defined and summarized in a draft of a proposed treaty between the United States and Canada which is annexed hereto and made a part of this report. The intended effect of such a treaty would be to subject international carriers, within the limits outlined, to obligations and requirements corresponding to those now imposed upon the interstate carriers of this country.

2. To accomplish the desired result a treaty between the two countries would be preferable to concurrent legislation. . . .

3. . . . this proposed treaty provides for a tribunal to enforce and administer its provisions, to be known as the International Commerce Commission The powers conferred upon and authority given to this Commission in respect of international carriers would correspond, to the extent indicated, to those exercised by the Interstate Commerce Commission in respect of interstate carriers within the United States.

4. International carriers by water between the United States and Canada should not be subjected to the provisions of such a treaty, except when and to the extent that they unite with rail carriers in either country in forming through water and rail or rail and water routes.

5. The provisions of such a treaty should apply to telegraph, telephone and express companies, and such companies should be subject as respects their international business to the authority of the International Commerce Commission.

The Chairman of the Interstate Commerce Commission (Knapp) to the Secretary of State (Knox), Dec. 30, 1910, MS. Department of State, file

811.773/6. See also the British Ambassador (Bryce) to Mr. Knox, Jan. 28, 1910, and the Assistant Secretary of State (Wilson) to Mr. Bryce, Mar. 17, 1910, *ibid.* /23309. The proposed treaty was communicated to the Canadian Government, but no further action seems to have been taken.

For the text of the proposed treaty, see Wilgus, *Railway Interrelations of the United States and Canada* (1937) 249 *et seq.*

In 1928 the Department of State and the Interstate Commerce Commission were in agreement that the matter of bringing about cooperation between the Commission and the Canadian Board of Railway Commissioners might well be accomplished through reciprocal legislation in the two countries, without need for a treaty.

Secretary Kellogg to Representative McLeod, Apr. 9, 1928, MS. Department of State, file 811.77342/2.

The United States is a party to the convention on the Pan American Highway signed at Buenas Aires December 23, 1936, by which the parties agree to collaborate in the "speedy completion" of a Pan American motor highway. Pan American Highway

4 Treaties, etc. (Trenwith, 1938) 4837; 51 Stat. 152.

A joint resolution of Congress approved May 4, 1928 referred to the resolution on a Pan American highway adopted by the Sixth International Conference of American States at Habana, and directed the cooperation of the United States Government. 45 Stat. 490. A joint resolution approved Mar. 4, 1929 appropriated \$50,000 for cooperation in surveys. 45 Stat. 1097. A similar appropriation was provided by the act approved Mar. 6, 1930. 46 Stat. 90, 115. An act approved June 18, 1934 appropriated \$75,000 for continuation of surveys. 48 Stat. 993, 996. The act approved June 19, 1934 appropriated \$1,000,000 for cooperation with the Governments members of the Pan American Union, in the survey and construction of the highway. 48 Stat. 1021, 1042. See also S. Doc. 224, 73d Cong., 2d sess.; Department of State, X *Press Releases*, weekly issue 247, pp. 424-425 (June 23, 1934). See also 52 Stat. 1146; 53 Stat. 1305; 55 Stat. 860; and Department of State, VI *Bulletin*, no. 134, p. 72 (Jan. 16, 1942).

Under the act approved May 31, 1933 (52 Stat. 590) the President appointed on August 16, 1933 the Alaskan International Highway Commission to cooperate with a similar agency in the Dominion of Canada in a study for the survey, location, and construction of a highway to connect the Pacific northwest part of continental United States with British Columbia and the Yukon Territory in the Dominion of Canada, and the Territory of Alaska. The Canadian Commission was appointed in December 1933. *American Delegations to International Conferences*, etc. (Department of State Conference Ser. 45) 125.

For the exchange of notes in Mar. 1942 between the United States and Canada with respect to the construction of a military highway to Alaska, see Department of State, VI *Bulletin*, no. 143, p. 237 (Mar. 18, 1942).

For the statute of the permanent international committee for the London-Istanbul highway, adopted at Budapest on Oct. 28, 1937, see VII Hudson, *International Legislation* (1941) 853.

Trans-Isthmian highway

A convention between the United States and Panama to arrange for the completion of a highway between the cities of Panamá and Colón through territory under their respective jurisdictions was signed at Washington on March 2, 1936. The United States undertook to obtain from the Panama Railroad Company such waiver of its exclusive right to establish roads across the Isthmus of Panama as was necessary for the project (art. I). The United States agreed to construct that portion of the highway between the Canal Zone boundary near Cativá and a junction with the Fort Randolph Road near France Field, which portion of the highway was thereafter to be maintained by Panama at its own expense (art. II). It is agreed in article VII that both Governments shall equally enjoy the use of the highway, subject to the laws and regulations relating to vehicular traffic in force in their respective jurisdictions. Ratifications were exchanged in Washington on July 27, 1939, and the convention was proclaimed by President Roosevelt on that date.

Treaty Series 946; 53 Stat. 1869.

For the arrangement effected by exchanges of notes in Oct. 1939, Dec. 1939, and Jan. 1940 between the United States of America and Panama, regarding the Trans-Isthmian Joint Highway Board, see *Ex. Agree. Ser.* 168.

Motor vehicles: Paris convention, 1909

On October 11, 1909 a convention with respect to the international circulation of motor vehicles was signed at a conference held in Paris. The United States was represented by a delegate, but he did not sign the convention. The United States took the position that the control and regulation of automobiles was primarily a State rather than a Federal matter. The convention established requirements of equipment for admission to international traffic, specified uniform danger signals to be used exclusively, and provided for free circulation in international travel with international certificates and plaques for cars whose drivers had international permits.

For the text of the convention, see Department of State, *Treaty Information Bulletin*, no. 13 (Oct. 1930), p. 25; 102 Br. & For. St. Paps. (1913) 64; III Martens' *Nouveau recueil général* (3d ser., 1910) 834. See report of the delegate of the United States (Hogan) to the Secretary of State (Knox), Oct. 15, 1909, MS. Department of State, file 17486/11-14. See also the Acting Secretary of State (Wilson) to the Chargé d'Affaires ad interim at Paris (Bailly-Blanchard), no. 416, July 31, 1909, *ibid.* /4-5; the Assistant Secretary of State (Wilson) to the Automobile Club of America, June 3, 1910, *ibid.* 579.7A1/21; the Ambassador to France (Bacon) to Mr. Knox, no. 242, Aug. 8, 1910, *ibid.* /24; Acting Secretary Wilson to Mr. Bacon, no. 143, Aug. 31, 1910, *ibid.* /26.

1926 convention

An international convention relating to motor traffic was signed at Paris on April 24, 1926 to revise and replace the convention of October 11, 1909. It provides for reciprocal recognition of automo-

bile licenses and drivers' permits in those countries ratifying or adhering to the convention. The United States was represented by an observer, but did not sign the convention.

Department of State, Treaty Information Bulletin, no. 13 (Oct. 1930), p. 36; III Hudson, *International Legislation* (1931) 1859; 108 League of Nations Treaty Series 123. See also Secretary Kellogg to President Coolidge, Apr. 6, 1926, MS. Department of State, file 511.91A2/4; the Counselor of Embassy at Paris (Whitehouse) to Mr. Kellogg, no. 7380, Apr. 19, 1927, *ibid.* /15; Secretary Stimson to Speaker Longworth, Dec. 8, 1930, *ibid.* 840.7971/9; the Assistant Secretary of State (Messersmith) to Frank A. Bayrd, May 23, 1939, *ibid.* 511.91A2/75.

See also the convention on road-traffic rules signed at Paris, Apr. 24, 1926, III Hudson, *International Legislation* (1931) 1872; 97 League of Nations Treaty Series 83.

The European Conference on Road Traffic held at Geneva under the auspices of the League of Nations in May 1931 concluded a convention for the unification of road signals (V Hudson, *International Legislation* [1936] 987; 150 League of Nations Treaty Series 247) and a convention on the taxation of foreign motor vehicles (Hudson, *op. cit.* 950; 138 League of Nations Treaty Series 149); both were opened for signature on Mar. 30, 1931. The United States is not a party to these conventions.

The Pan American convention for the regulation of automotive traffic was signed at a special conference in Washington on October 6, 1930. The United States was a signatory but has not ratified this convention.

Pan
American
convention,
1930

Department of State, Treaty Information Bulletin, no. 13 (Oct. 1930), pp. 18-24; V Hudson, *International Legislation* (1936) 786; report by the Chairman of the Delegation of the United States to the Pan American Conference on the Regulation of Automotive Traffic (Drake) to the Secretary of State (Stimson), Dec. 1, 1930, MS. Department of State, file 515.4D2A/14.

The convention covers the use in international traffic of license plates and drivers' permits, standard equipment required, admission of vehicles for 90 days without posting bond, certain rules to avoid collisions, limitations upon the size of vehicles, and contains a provision that "Danger, restriction and direction signs shall be made uniform."

A convention relating to the creation of a Pan American tourist passport and a transit passport for vehicles was signed at Buenos Aires on June 19, 1935. The United States is not a signatory. Department of State, Treaty Information Bulletin, no. 71 (Aug. 1935), pp. 16, 27-29.

In the absence of American ratification of or accession to the international conventions with respect to motor vehicles, informal arrangements are made for American nationals to operate their automobiles abroad and for aliens to bring their cars into the United States for touring purposes.

Informal
arrangements

Few special formalities are required with respect to Canada or Mexico.

In section 308 of the Traffic Act of 1930 provision is made for temporary free importation of motor vehicles under bond for exportation within six months. 46 Stat. 590, 690.

All States of the United States have signified their willingness to grant reciprocal recognition to foreign license plates and drivers' licenses if the same recognition be granted in return. The Department of State to the Italian Embassy, June 11 and July 18, 1928, MS. Department of State, file 811.7971/7, /10; the American Automobile Association to Secretary Kellogg, Sept. 4, 1928, MS. Department of State, file 579.7A1/52.

It has been possible for Americans to obtain international drivers' licenses and documents entitling their cars to travel in Europe and in other continents by arrangements made through automobile clubs and certain steamship lines. See *Taking Your Car Abroad* (Department of Commerce Trade Promotion Ser. 184, 1938); American Automobile Association, Foreign Travel Division, *Motoring Abroad* (published annually); the Chief of the Division of Foreign Service Administration (Hengstler) to John S. Russell, Jr., July 15, 1933, MS. Department of State, file 800.7971/34.

Electric
power
and gas

By section 202(e) of the Public Utility Act of August 26, 1935 the exportation from the United States of electrical energy is made unlawful except upon the authorization of the Federal Power Commission. By section 3 of the act of June 21, 1938 the Commission is also given authority to control the exportation and importation of natural gas to or from a foreign country.

49 Stat. 808, 849; 16 U.S.C. §824a; 52 Stat. 821, 822.

In 1913 Attorney General McReynolds advised President Wilson that—"in the absence of legislation by Congress you may not only prohibit the importation of electrical power to this country from Canada, but may also grant permission therefor subject to such conditions as to you may seem good." 30 Op. Att. Gen. 217, 222.

In replying to an inquiry concerning the importation of hydroelectric power from Canada, the Department of State referred to this opinion of the Attorney General and said:

"... In accordance with this opinion, where a project involves a physical connection between the United States and a foreign country, the Department has held that it is necessary to obtain the consent of the President. If the company to which you refer in your letter under acknowledgment will submit to this Department a petition for the issuance of a Presidential license, the Department will give consideration to the question of issuing the appropriate license.

"It should be understood that the project should be submitted to the Secretary of War, together with the necessary plans, specifications, blue prints, and other information for his consent, if the power line crosses or is constructed in navigable waters of the United States, as required by Section 10 of the Act of Congress approved March 3, 1899, (30 Stat. L. 1151). Furthermore the necessary permits and concessions for the construction of the transmission line should be obtained from the Government of Canada."

The Acting Secretary of State (Cotton) to Senator Dill, Feb. 26, 1930, MS. Department of State, file 811.6463 Pend Oreille River/3.

The Department of State took the position that the act of May 27, 1921 relating to the landing and operation of submarine cables, 42 Stat. 8,

was applicable to the importation of electric power if a submarine cable were used as a means of importing it. The Assistant Secretary of State (Payer) to the Consul General at Montreal (Frost), Sept. 27, 1933, MS. Department of State, file 811.6463/10.

On Jan. 11, 1935 Attorney General Cummings rendered an opinion to the effect that the President had the power to grant a license for the construction and maintenance of a natural-gas pipe line crossing the Mexican boundary. 38 Op. Att. Gen. 163.

Executive Order 8202, of July 13, 1939, authorizes and requests the Federal Power Commission—

to receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the transmission of electric energy between the United States and foreign countries, and for the exportation and importation of natural gas to or from foreign countries, and (2), after obtaining the recommendations of the Secretary of State and the Secretary of War thereon, to submit each such application to the President with a recommendation as to whether the permit applied for should be granted, and if so, upon what terms and conditions.

Power lines
and pipe
lines

4 F. R. 3243 (July 15, 1939).

See also the Acting Chairman of the Federal Power Commission (Seavey) to President Roosevelt, and the Director of the Bureau of the Budget (Smith) to the Secretary of State (Hull), May 23, 1939, MS. Department of State, file 811.6463 Licenses/3.

See further, testimony and memorandum of the Solicitor for the Department of State (Nielsen), Dec. 16 and 22, 1920, Hearings before a Subcommittee of the Senate Committee on Interstate Commerce, 66th Cong., 3rd sess., on cable-landing licenses, pp. 243 *et seq.*; see also *ibid.*, pp. 26-27.

A convention on the transmission in transit of electric power was opened for signature at Geneva, Dec. 9, 1923. II Hudson, *International Legislation* (1931) 1173; 58 League of Nations Treaty Series 315.

FREEDOM OF TRANSIT

§364

The Covenant of the League of Nations provides in article 23:

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

(e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League.

3 Treaties, etc. (Redmond, 1923) 3329, 3344.

"... The Organization for Communications and Transit is the most autonomous among the League's technical bodies, operating under a highly developed constitution. It fulfills the duties of providing for the securing and maintenance of freedom of communications and transit under the condition of Article 23e of the Covenant, but its relation with the Members of the League is the outcome of the technical experience of the Paris Peace Conference in its field. . . . The dominating principle . . . adopted was that this technical field should be so organized that the most authoritative Government representatives and the best-qualified experts should work together directly, without having to act through political and diplomatic agents. The Assembly of 1920 established the Organization in accordance with that principle, leaving to the General Conference the task of formulating the constitution.

"... The General Conference derives its authority directly from the Governments; its decisions are not subject to approval by the Assembly or Council. The General Conference elects the Members whose representatives constitute the Advisory and Technical Committee, the decisions of which are communicated to Governments unless the Assembly or Council by unanimous vote decide otherwise. . . .

"The Organization consists of the Members of the League and states non-Members admitted by the Assembly or by the General Conference. . . .

"... The General Conference is held every four years, except for special reasons. The sessions have been convened as follows:

1. Barcelona, March 10–April 20, 1921; 44 states represented;
2. Geneva, November 15–December 9, 1923; 41 states represented;
3. Geneva, August 23–September 2, 1927; 41 states represented;
4. Geneva, October 12–24, 1931; 38 states represented.

"Since the second session, international organizations have attended in an advisory capacity, greatly extending the range of cooperation.

"... The Organization's objects are two-fold:

"The development of standardized practices in the field of communications by means of international conventions embodying general rules;

"The promotion of technical and administrative co-ordination and co-operation by simplifying formalities and unifying regulations, some times in the form of conventions and some times by recommendations to which the Members are asked to conform.

"The field is so wide that the Organization confines its activities to those subjects of international concern which require governmental co-operation and action, and even within those bounds avoids dealing with the technical aspects of postal and telecommunications questions, for which public international unions exist. The numerous transport problems involving collaboration between private bodies do not fall within the scope of the Organization's functions, but it may indicate the form their agreements should take in the general interest of the international community."

Myers, *Handbook of the League of Nations* (1935) 194–197. The work of the Organization in matters of transport statistics, improvement of news services, passports and travel documents, navigable waterways, maritime ports, railways, road traffic, power transmission, calendar reform, and the like is discussed *ibid.* 198–211. See also League of Nations Secretariat, Information Section, *Communications and Transit* (1924).

The Permanent Court of International Justice was asked by the Council of the League of Nations to give an advisory opinion on the question whether international engagements in force obliged Lithuania to open for traffic a portion of the railroad which, prior to 1914, had connected territory which became Lithuanian after 1918 with that which became Polish. The Advisory and Technical Committee for Communications and Transit took the position that such an obligation ensued from the convention with respect to Memel, signed May 8, 1924, and from article 23(e) of the Covenant. The Court held that Lithuania was not under an obligation to open the railway line, and said that—

"it is impossible to deduce from the general rule contained in Article 23(e) of the Covenant an obligation for Lithuania to open the Landwarów-Kaisiadorys railway sector for international traffic, or for part of such traffic; such obligation could only result from a special agreement." *Railway Traffic between Lithuania and Poland*, Per. Ct. Int. Jus., Advisory Opinion, Oct. 15, 1931, ser. A/B, no. 42, pp. 108, 119; II Hudson, *World Court Reports* (1935) 749, 758.

Under the auspices of the League of Nations, a general Conference on Freedom of Communications and Transit met at Barcelona in 1921. It concluded a convention and statute on freedom of transit. After defining "traffic in transit" to cover persons, baggage, goods, and means of transport passing through a state's territory from a point without it to another point without it, the statute provides in article 2:

Treaties for
freedom of
transit

Subject to the other provisions of this Statute, the measures taken by Contracting States for regulating and forwarding traffic across territory under their sovereignty or authority shall facilitate free transit by rail or waterway on routes in use convenient for international transit. No distinction shall be made which is based on the nationality of the persons, the flag of the vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods or of vessels, coaching or goods stock or other means of transport.

7 League of Nations Treaty Series 11, 27; I Hudson, *International Legislation* (1931) 625, 632.

The statute further provides that there shall be no special dues in respect of transit except dues intended solely to defray expenses of supervision and administration entailed by such transit. On routes operated or administered by the states or under concession, the contracting states undertake to apply reasonable rates to traffic in transit. There are reservations with respect to transit of passengers and goods whose admission is prohibited and with respect to emergency measures. The statute specifies that it "does not prescribe the rights and duties of belligerents in time of war".

Under articles 321 and 322 of the Treaty of Versailles Germany undertook to grant freedom of transit for the benefit of the Allied and Associated Powers. 3 Treaties, etc. (Redmond, 1923) 3329, 3485.

With respect to freedom of transit and the law of international communications in general, see de Visscher, *Le droit international des communications* (1924); Bourquin, *L'organisation internationale des voies de communica-*

tion", *Académie de Droit International* (La Haye), 5 *Recueil des cours*, 1924, p. 159; J. Hostie, "*Examen de quelques règles du droit international dans le domaine des communications et du transit*", 40 *idem*, 1932, p. 397; Leener, *Règles générales du droit des communications internationales*, 55 *idem*, 1936, p. 1.

Various bilateral commercial treaties provide for freedom of transit. See for example, art. XV of the treaty of June 5, 1928 between the United States and Norway. 4 *Treaties*, etc. (Trenwith, 1938), 4527, 4533-4534.

Meaning of
freedom of
navigation
and commer-
cial equality

Under the convention of Saint-Germain-en-Laye of September 10, 1919 (4 *Treaties*, etc. [Trenwith, 1938] 4849) provision was made for commercial equality in the Congo and for freedom of navigation thereon. A company in part owned and controlled by the Belgian Government and known as "Unatra" carried on transport service on the Congo, as did several companies—carrying chiefly their own products—and also a British subject, Oscar Chinn. In 1931 the Government, because of the depression and because of its desire to reduce the cost of colonial products, lowered the freight rates to be charged by Unatra to nominal figures and undertook to refund to Unatra the resulting losses. Similar treatment was requested by Chinn but was refused; injury to his carrying business ensued. The British Government claimed that the Belgian actions were inconsistent with the international obligations of the Belgian Government. By a vote of six to five the Permanent Court of International Justice held that the measures complained of did not constitute a violation of the international obligations of Belgium. The court said:

According to the conception universally accepted, the freedom of navigation referred to by the Convention comprises freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers.

Freedom of trade, as established by the Convention, consists in the right—in principle unrestricted—to engage in any commercial activity, whether it be concerned with trading properly so-called, that is the purchase and sale of goods, or whether it be concerned with industry, and in particular the transport business; or, finally, whether it is carried on inside the country or, by the exchange of imports and exports, with other countries. Freedom of trade does not mean the abolition of commercial competition; it pre-supposes the existence of such competition. Every undertaking freely carrying on its commercial activities may find itself confronted with obstacles placed in its way by rival concerns which are perhaps its superiors in capital or organization. It may also find itself in competition with concerns in which States participate, and which have occupied a special position ever since their formation, as is the case of Unatra.

A concentration of business of this kind will only infringe freedom of commerce if commerce is prohibited by the concession of a right precluding the exercise of the same right by others; in other words, if a "monopoly" is established which others are bound to respect.

The Court sees nothing in the measure taken by the Belgian Government indicative of such a prohibition.

The form of discrimination which is forbidden is therefore discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups.

The Oscar Chinn Case, Per. Ct. Int. Jus., Judgment, Dec. 12, 1934, ser. A/B, no. 63, pp. 65, 83-85, 87; III Hudson, *World Court Reports* (1938) 416, 434-436, 438.

AVIATION

SOVEREIGNTY OVER AIR-SPACE

§365

In the early discussions concerning the international law governing aircraft and aviation probably the most discussed question was whether a state has sovereignty over the air-space above its territory. In part the discussion went back to a maxim of early English law: *cuius est solum, eius est usque ad coelum*. Although the maxim was established in connection with problems of municipal law, an attempt was made to carry it into the field of international law.

One of the earliest cases in which any mention was made of the law governing the flight of aircraft was the English case of *Pickering v. Rudd*, 4 Camp. 219, 221 (1815). In that case the reference to the flight of balloons, although a dictum, carried the inference that the flight of an aeronaut over the property of another person did not make the aeronaut liable to an action of trespass *quare clausum fregit*.

At the meeting of the Institute of International Law held in Brussels in 1902, Fauchille submitted a report and a draft convention on the regulation of aerial navigation. In 1906 two opposing ideas were advanced before the Institute: one, that the air is completely free to all parties both for aerial navigation and for the use of wireless telegraphy, and the other, that the air is subject to the sovereignty of the subjacent state. Fauchille suggested that the two propositions be combined to allow freedom of the air, subject to the right of self-defense. Westlake distinguished between the terms *air* and *air-space* and defended the idea of sovereignty over the air-space, subject to a right of innocent passage. The proposition submitted by Fauchille was accepted by the Institute.

At the 1911 session of the Institute, drafts having been submitted by Fauchille and Von Bar, there was adopted a brief text providing for the regulation of aircraft in time of peace and war. It contained provision that aircraft, to be distinguished as public aircraft and private aircraft, must have the nationality of the country of registration and must bear marks of identification. The provision dealing with the subject of sovereignty stated: "International aerial circulation is free, saving the right of subjacent States to take certain measures, to be determined, to ensure their own security and that of the persons and property of their inhabitants." Concerning the regulation of aircraft in time of war, it was provided only that aerial war should be allowed on condition that it did not present to the persons or property of peaceful populations greater dangers than land or sea warfare. The *projet* was never accepted as the basis of an international convention.

The World War of 1914-18 interrupted the consideration of the theory applicable to the regulation of aerial navigation. However, the practice of states in that interim did much to crystallize the practical application of theory so far as the question of air sovereignty was concerned. During the war, states acted upon the assumption that they had sovereignty over the air-space; and, at its close, when the convention for the regulation of aerial navigation was signed at Paris in 1919, there was incorporated in article I a provision that:

The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory.

Multilateral conventions and bilateral conventions and agreements are now based upon the assumption that the state has exclusive sovereignty in the air-space over its territory and territorial waters.

19 *Annuaire de l'Institut de Droit International* (1902) 19; 21 *idem* (1906) 208, 327; 23 *idem* (1910) 297, 497; 24 *idem* (1911) 23, 303; Scott, *Resolutions of the Institute of International Law* (1916) 164, 170; 3 *Treaties, etc.* (Redmond, 1923) 3768, 3772; 11 *League of Nations Treaty Series* (1922) 190. See also Lycklama à Nijeholt, *Air Sovereignty* (1910) and reports of the conferences of the International Law Association (London): Twenty-seventh Conference (1912) 213 *et seq.*; Twenty-eighth Conference (1913) 522 *et seq.*; Twenty-ninth Conference (1920) 377 *et seq.*

By the Air Commerce Act of 1926, as amended in 1938, it is provided in section 6(a):

The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions of the adjacent marginal high seas, bays, and lakes, over which by

international law or treaty or convention the United States exercises national jurisdiction. Aircraft a part of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

52 Stat. 1028; 49 U.S.C. §176. With respect to foreign civil aircraft, see §369.

PUBLIC AIR LAW

§366

The convention for the regulation of aerial navigation concluded at Paris, October 13, 1919, as amended in 1929, consists of nine chapters and eight annexes. Chapter I provides that every power has complete and exclusive sovereignty over the air-space above its territory and defines the territory of a state as including the national territory both of the mother country and of the colonies and the territorial waters adjacent thereto (art. 1). Freedom of innocent passage above national territory for the aircraft of other states is provided for, and it is stipulated that regulations regarding the passage of aircraft shall be applied without distinction of nationality (art. 2). Article 3 recognizes the right of a state to prohibit flying over certain areas in its territory; and article 4 stipulates that planes inadvertently flying over a prohibited area shall give the distress signal and land as soon as possible. Contracting states may conclude with non-contracting states special conventions not infringing on the rights of the parties to the convention and, so far as is consistent with their objects, not contradictory to the general principles of the convention (art. 5).

Paris
convention,
1919

By chapter II aircraft are declared to possess the nationality of the country in whose registry they are entered in accordance with the provisions of section I of annex A. Registration is to be made in accordance with the laws of each contracting state, but no aircraft is permitted to be registered in more than one state (arts. 6-8). Article 9 provides for the interchange of information concerning registrations and cancelations through the International Commission for Air Navigation; and article 10 provides for identification marks to be borne by aircraft engaged in international navigation.

Chapter III provides for the issuance of licenses and certificates of airworthiness and competency and for the recognition by other states of certificates and licenses issued by the state whose nationality the aircraft possesses. Article 14 provides that wireless apparatus shall be carried and operated only when a special license therefor has been issued by the state of the nationality of the aircraft, and that aircraft engaged in public transport and capable of carrying ten or more persons shall be equipped with sending and receiving apparatus.

Chapter IV provides that all aircraft of a contracting state shall have the right to cross the air-space of another state without landing but may be required to land if the regulations of the state concerned obligate them to do so (art. 15). Article 15 also contains provision that "Every contracting State may make conditional on its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing on its territory." Article 18 provides that all aircraft passing through territory of a contracting state shall be exempt from seizure because of infringement of patent or design or model, upon the deposit of adequate security.

Chapter V contains rules to be observed by aircraft on departure, during flight, and on landing.

Chapter VI forbids the carrying of explosives and of arms and munitions of war in international aerial navigation and provides that no foreign aircraft shall be permitted to carry any such articles between any two points in the same contracting state (art. 26). The use of photographic apparatus in aerial navigation is left to regulation by each state (art. 27), and each state may likewise regulate the carriage of any other objects in the interest of public safety, but such regulations must apply equally to national and to foreign aircraft (arts. 28 and 29).

Chapter VII defines state aircraft as those of a military character commanded by a person in military service (detailed for that purpose) and aircraft exclusively employed in state service (arts. 30 and 31). Article 32 provides that no military aircraft shall fly over the territory of another state or land thereon without special permission.

Chapter VIII provides for the establishment of the International Commission for Air Navigation under the direction of the League of Nations.

Annexes deal with the marking of aircraft, certificates of airworthiness, log-books, rules of the air and rules as to lights and signals, qualifications of pilots and navigators, maps and ground markings, dissemination of meteorological information, and customs.

3 Treaties, etc. (Redmond, 1923) 3768-3820; 11 League of Nations Treaty Series (1922) 173-310. See also protocols of amendment, 78 *idem* (1928) 438; 138 *idem* (1933) 418, 421, 427.

The convention relating to aerial navigation was submitted in 1919 to the Versailles Peace Conference by the Aeronautic Commission of the Peace Conference, composed of delegates of the United States, British Empire, France, Italy, Japan, Belgium, Brazil, Cuba, Greece, Portugal, Rumania, and the Serb-Croat-Slovene State. Reservations were made by the United States, British Empire, France, Italy, Cuba, and Portugal. "Report presented to the Conference of the Peace by the Aeronautical Commission", MS. Department of State, file 579.6D1/32.

On Apr. 9, 1920, the Ambassador in Paris was instructed to sign the convention and to make the following reservations on behalf of the United States:

"The United States expressly reserves, with regard to Article 3, the right to permit its private aircraft to fly over areas over which private aircraft of other contracting States may be forbidden to fly by the laws of the United States, any provision of said Article 3 to the contrary notwithstanding.

"The United States reserves complete freedom of action as to customs matters and does not consider itself bound by the provisions of Annex H or any articles of the Convention affecting the enforcement of its customs laws.

"The United States reserves the right to enter into special treaties, conventions, and agreements regarding aerial navigation with the Dominion of Canada and/or any country in the Western Hemisphere if such Dominion and/or country be not a party to this Convention."

Secretary Colby to Ambassador Wallace, telegram 722, Apr. 9, 1920, MS. Department of State, file 579.6D1/48b.

Refusal of the French Government to accept reservations at the time of signature led to the Ambassador's signing the convention and depositing with the French Foreign Office a note which set forth the reservations of the United States and requested that a copy of the reservations be communicated to each signatory government and that copies of the reservations made by other signatory governments be supplied to him for the United States. Ambassador Wallace to Secretary Colby, no. 1246, June 2, 1920 (enclosure 1), MS. Department of State, file 579.6D1/76. See also *ibid.*, enclosure 2.

Canada also signed the convention with reservations, one of which had to do with her right (in the event that the United States did not become a party to the convention) to make reciprocal arrangements with the United States permitting the flight of aircraft which, under the convention, would be properly registerable. Ambassador Wallace to Secretary Colby, no. 1851, July 8, 1920 (enclosures), MS. Department of State, file 579.6D1/84.

Efforts to remove the difficulties caused by the restrictions of article 5, which originally provided that contracting states should not permit flight over their territory by aircraft of non-contracting states save by special and temporary permission, were begun even before the convention had become effective. The first result of these efforts was a protocol providing for the granting of departures from the provisions of article 5. The protocol was not a complete cure for the defects of the article, and on October 27, 1922 there was completed an amendment to go into effect as soon as all the states then parties to the convention should have effected deposits of ratification of the amendment. The amendment provided, *inter alia*:

Amendments

No contracting State shall, except by a special and temporary authorization, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State, unless it has concluded a special convention with the State in which the aircraft is registered.

The article was further amended in 1929 to read, in part:

Each contracting State is entitled to conclude special conventions with non-contracting States.

78 League of Nations Treaty Series (1928) 438; 138 *idem* (1933) 420.

Germany's position in regard to the Paris convention was set forth in an article entitled "Germany and the Paris Convention relating to air navigation dated 13th October 1919", written by Dr. Wegerdt, Ministerialrat in the Reich Ministry of Communications, published in October 1928 in *II Zeitschrift für das gesamte Luftrecht*, no. 1, p. 25. The article served as the force which set in motion plans for a conference for a general discussion of the convention and for amending it to facilitate adherence by states which had found it objectionable. Accordingly, the International Commission for Air Navigation sent out invitations to a general conference, i.e., "an extraordinary session to which will be invited, side by side with the Governments of the States parties to the Convention, the Governments of all the non-contracting States".

As a result of the conference held in 1929 there was drawn up a protocol relating to the amendment of articles 3, 5, 7, 15, 34, 37, 41, and 42, and the final clauses of the convention. The amendments came into force on May 17, 1933, at which time they had been ratified by all the states parties to the convention in 1929, at the time of the adoption of the protocol, except Persia, which, meanwhile, had denounced the convention. At the same time there came into effect a further amendment to article 34 and an amendment to article 40.

The Secretary General of the International Commission for Air Navigation (Roper) to the Secretary of State (Kellogg), Feb. 15, 1929, MS. Department of State, file 579.6D1/287; the Chargé d'Affaires ad interim in Paris (Armour) to the Secretary of State (Stimson), no. 9464, Apr. 8, 1929, *ibid.* /282; 138 League of Nations Treaty Series (1933) 418 and 427.

For the report of the American Delegates to the extraordinary session of the International Commission for Air Navigation to Secretary Stimson, June 28, 1929, see MS. Department of State, file 579.6D1/318.

Article 34 of the 1919 convention provides:

There shall be instituted, under the name of the International Commission for Air Navigation, a permanent Commission placed under the direction of the League of Nations . . .

3 Treaties, etc. (Redmond, 1923) 3768, 3778; 11 League of Nations Treaty Series (1922) 173, 195.

In adopting regulations for the administration of the International Commission for Air Navigation, the Commission provided in article 25:

The International Commission for Air Navigation is placed, in accordance with Article 34 of the Convention, under the direction of the League of Nations. It will communicate to the Council of the League all its publications and decisions. If need be, it will advise the Council of the League on questions which may be referred to it.

International Commission for Air Navigation, *Official Bulletin*, no. 1 (Aug. 1922), p. 10.

The relation between the League of Nations and the International Commission for Air Navigation constituted a stumbling block to ratification by the United States.

See note by the Secretary General on the Relations Between the International Commission for Air Navigation and the League of Nations, June 7, 1929, International Commission for Air Navigation, Extraordinary Session of June 1929, Documents, p. 71; International Commission for Air Navigation, Extraordinary Session of June 1929, Sitzings of June 12, p. 9; report to the Secretary of State (Stimson) by the American Delegates to the extraordinary session of June 19, 1929, of the International Commission for Air Navigation (MacCracken and Baker), June 28, 1929, MS. Department of State, file 579.6D1/318.

On June 15, 1926 Secretary Kellogg sent a report to President Coolidge recommending the submission of the convention to the Senate for advice and consent to ratification, with reservations with respect to articles 34 and 37, having to do with the League of Nations and the Permanent Court of International Justice, respectively. The President transmitted the convention to the Senate on the following day. No action having been taken by the Senate, on June 8, 1928 the Department of Commerce suggested to the Secretary of State that the convention be withdrawn from the consideration of the Senate "for the present" in order that an opportunity might be afforded to try out the regulations under the Air Commerce Act of 1926. A letter in this sense was sent by the Secretary of State to the Chairman of the Committee on Foreign Relations on Feb. 20, 1929. Subsequently, on Jan. 15, 1934, the convention was returned to the Department of State, at its request, for further study in connection with amendments which had been made following its submission to the Senate. Secretary Kellogg to President Coolidge, June 15, 1926, and President Coolidge to the Senate, June 16, 1926, MS. Department of State, file 579.6D1/221a; the Secretary of Commerce (Hoover) to Mr. Kellogg, June 8, 1928, *ibid.* /250; Mr. Kellogg to Senator Borah, Feb. 20, 1929, *ibid.* /266; the Under Secretary of State (Phillips) to President Roosevelt, Jan. 11, 1934, *ibid.* /442A; Cong. Rec., vol. 78, pt. 1, p. 628. See also 1926 For. Rel., vol. I, pp. 145-152, 172-174.

Despite the non-ratification of the convention of 1919 the Government of the United States has cooperated with the parties thereto by U.S. cooperation

supplying information to assist the International Commission for Air Navigation in carrying out the functions for which it was created.

. . . It is to be observed that the [Paris] Convention contains Annexes A-H which embody very important technical regulations designed to give effect to the Convention. It will be noted from the examination of these annexes that they are very lengthy and complicated. They are, with the exception of Annex H relating to customs procedure, subject to frequent changes by the International Commission for Air Navigation, a permanent organization created under the terms of Article XXXIV of the Convention. As applied to the United States, if the Convention should be ratified by the Government of the United States, the regulations as adopted by the International Commission for Air Navigation would be binding on the United States without the Government of this country having an opportunity to determine whether they would be acceptable.

It is very doubtful whether an organization composed largely of representatives of European countries would be in a position to adopt regulations that would be entirely adaptable to flying conditions in the territories of the American Republics. Taking as an illustration the technical requirements of the Paris Convention in regard to airworthiness requirements for aircraft, it is to be observed that the Government of the United States has by pursuing an independent course in the formulation of its airworthiness requirements succeeded in building up a set of such requirements which, it is believed, are superior to those of many countries, including some that are parties to the Paris Convention.

Secretary Hull to the American Delegates to the Inter-American Technical Aviation Conference, Sept. 2, 1937, MS. Department of State, file 579.6AC1/282.

Ibero-American convention, 1926

The Ibero-American convention of international aerial law was signed at Madrid on November 1, 1926. In principle and in many details this convention is similar to the Paris convention of 1919.

III Hudson, *International Legislation* (1931) 2019; League of Nations, *Inquiries Into the Economic, Administrative and Legal Situation of International Air Navigation* (pub. 1930. VIII.6), p. 178. The convention is now only of historical significance.

Habana convention, 1928

On February 20, 1928 a convention on commercial aviation was signed at Habana. It was submitted to the Senate for its advice and consent to ratification on December 15, 1930. While action by the Senate was pending, the Assistant Secretary of State (White) and the Assistant Secretary of Commerce (Young) communicated, February 9, 1931, to Senator Borah, Chairman of the Committee on Foreign Relations, a joint statement reading in part as follows:

The convention was designed especially to meet conditions existing in the Western Hemisphere and to permit the normal

development of air transportation by the gradual adoption of such rules and regulations as may be found by experience to meet the requirements of air navigation in this Hemisphere.

The essence of the Habana Convention is contained in Articles 4, 5, 21, 22 and 30.

By Article 4 each contracting state undertakes in time of peace to accord freedom of innocent passage above its territory to aircraft of other contracting states subject to the conditions laid down in the Convention.

Article 5 accords to each contracting state the right to prohibit for reasons which it deems convenient in the public interest flights over fixed zones of its territory by the aircraft of other contracting states with the reservation that no distinction shall be made in this respect between its own private aircraft engaged in international commerce and those of other contracting states likewise engaged.

Article 21 provides that aircraft engaged in international commerce shall be permitted to discharge or take on at different airports in the territory of a contracting state passengers or cargo from or destined to points beyond the borders of such state.

Article 22 accords to each contracting state the right to establish reservations and restrictions in favor of its own national aircraft in regard to the commercial transportation of passengers and merchandise between two or more points in its territory, and to other remunerated aeronautical operations wholly within its territory.

The right accorded to each contracting state by Article 30 to enter into any convention or special agreement with any other state is subject to a proviso . . . that two or more states for reasons of reciprocal convenience and interest may agree upon appropriate regulations pertaining to the operation of aircraft and the fixing of specified routes. These regulations must guarantee equality of treatment to the aircraft of each and every one of the contracting states. This proviso follows substantially the form of an amendment offered by Mr. Henry P. Fletcher on behalf of the American delegation at the Habana Conference. Mr. Fletcher stated . . . that the desire of the United States to safeguard the Panama Canal prompted the suggestion of the amendment.

It is somewhat uncertain whether, if the United States and any appreciable number of Latin American countries should eventually decide to become parties to the Paris Convention, the result would be an abandonment of the Habana Convention. It is believed, however, that it would be possible for the countries of the Western Hemisphere to develop technical rules and regulations in conformity with the Paris Convention and at the same time maintain the general framework of the Habana Convention.

Relation to
Paris
convention

Report of the Delegates of the United States of America to the Sixth International Conference of American States (1928) 32, 177; MS. Department of State, file 710.F Commercial Aviation/66. See Warner, "The International Convention for Air Navigation: and the Pan American Convention for Air Navigation: A 'Comparative and Critical Analysis'", in 3 *Air Law Rev.* (1932) 221-308.

On Feb. 20, 1931 the Senate gave its advice and consent to ratification of the Habana convention, and on Mar. 6, 1931 the President ratified it. Treaty Series 840; 47 Stat. 1901; 4 Treaties, etc. (Trenwith, 1938) 4729.

Interpretation Article IV of the Habana convention provides:

Each contracting state undertakes in time of peace to accord freedom of innocent passage above its territory to the private aircraft of the other contracting states, provided that the conditions laid down in the present convention are observed. The regulations established by a contracting state with regard to admission over its territory of aircraft of other contracting states shall be applied without distinction of nationality.

The United States concluded that by the terms of the article each state undertook in time of peace to accord freedom of innocent passage above its territory, subject to the conditions laid down in the convention, rendering it unnecessary for any state party to the convention and complying with its conditions to obtain special permission for the flight of aircraft over the territory of other states parties to the convention. It communicated this interpretation to the other contracting parties, expressing a desire to reach an agreement concerning procedure. Costa Rica, Chile, Dominican Republic, Ecuador, Guatemala (in practical effect), Haiti, Nicaragua, and Panama expressed their acquiescence in the interpretation. The United States has not contended that its interpretation applied to a scheduled air transport service.

The Chargé d'Affaires ad interim at San José (Trueblood) to the Secretary of State (Hull), no. 1663, Oct. 13, 1933, MS. Department of State, file 711.1827/2; the Chargé d'Affaires ad interim at Santiago (Scotten) to Mr. Hull, no. 230, Nov. 20, 1934, *ibid.* 711.2527/2; the Secretary of Legation at Santo Domingo (Brown) to Mr. Hull, no. 971, May 11, 1933, *ibid.* 711.3927/2; the Minister to Ecuador (Gonzalez) to Mr. Hull, no. 546, Sept. 29, 1936, *ibid.* 810.79611 Harding, W.B./4; the Minister to Guatemala (Hanna) to Mr. Hull, no. 664, May 29, 1935, *ibid.* 711.1427/7; the Minister to Haiti (Armour) to Mr. Hull, no. 387, Aug. 17, 1934, *ibid.* 711.3827/2; the Minister to Nicaragua (Hanna) to the Secretary of State (Stimson), no. 1164, Mar. 1, 1933, *ibid.* 711.1727/1; the Minister to Panama (Gonzalez) to Mr. Hull, no. 16, Oct. 27, 1933, *ibid.* 711.1927/9.

Mexico refused to agree to the interpretation that under article 4 private aircraft may fly over the territory of contracting parties without first obtaining permission. The Chief of the Department of Political Affairs of the Mexican Ministry of Foreign Affairs to the Second Secretary of the

American Embassy (Hawks), no. 3348, May 24, 1934 (translation; enclosure 2 in despatch 1468 of June 1, 1934), MS. Department of State, file 811.79612/71.

In Treasury Decision 46898, in which the Treasury Department published the list of countries with which the United States has agreed to interpret the Habana convention in such a way as to allow civil aircraft to enter such countries without obtaining special permission to do so, attention was called to the fact that, although civil aircraft of the countries listed could enter the United States without special permission from the Secretary of Commerce, they must nevertheless comply with the usual customs regulations governing the entry and clearance of aircraft. Customs regulations

See Customs Regulations of the United States (1937), arts. 245-247.

The desirability of uniformity in the technical phases of aviation led to the convening in Lima in Sept. 1937 of an inter-American conference to study technical problems, at which it was resolved to create and maintain a Permanent American Aeronautical Commission (*Comision Aeronautica Permanente Americana*, sometimes referred to as the C.A.P.A.) For the most part the conference confined its activities to the adoption of recommendations for the establishment of uniformity in the fields of customs, meteorology, touring, aero-clubs, and sanitary aviation. The report of the Delegation of the United States of America to the Inter-American Technical Aviation Conference to Secretary Hull (undated), MS. Department of State, file 579.6AC1/289; Final Act of the Inter-American Technical Aviation Conference (Lima, Sept. 15-25, 1937); the Peruvian Embassy to Secretary Hull, Nov. 22, 1937 (enclosure), MS. Department of State, file 579.6AC1/294.

The sanitary convention for aerial navigation, concluded at The Hague on April 12, 1933, contains provisions with respect to measures to be taken by aircraft in international flight in cases of plague, cholera, yellow fever, exanthematous typhus, smallpox, etc. Sanitary regulations

The American Minister in the Netherlands signed the convention on April 6, 1934, subject to two reservations:

(1) With reference to Article 61 [relating to amendments] no amendments to the convention will be binding on the Government of the United States of America or territory subject to its jurisdiction unless such amendments be accepted by the Government of the United States of America.

(2) The Government of the United States of America reserves the right to decide whether from the standpoint of the measures to be applied a foreign district is to be considered as infected, and to decide what requirements shall be applied under special circumstances to aircraft and personnel arriving at an aerodrome in the United States of America or territory subject to its jurisdiction.

Treaty Series 901; 4 Treaties, etc. (Trenwith, 1938) 5489; 49 Stat. 3279; MS. Department of State, file 512.4A1A1/111, /131. See also the Assistant Secretary of State (Phillips) to the Minister at The Hague (Emmet), no. 1, Mar. 21, 1934, *ibid.* /116.

The sanitary convention has been ratified by a number of countries, including the United States. Definitive adherences have also been deposited by several countries. Article 65 of the convention provides that any high contracting power may declare that its acceptance of the convention does not bind any or all of its "colonies, protectorates, territories beyond the sea, or territories under its suzerainty or mandate" and that subsequently the high contracting power may give notice to the Government of the Netherlands that it desires the convention to apply to any or all of its territories made subject to such a declaration. Action has been taken under this provision in several instances.

Fuel and
lubricants
convention

On the invitation of the British Government there convened in London in February 1939 a conference, as a result of which there was adopted a convention concerning exemption from taxation for liquid fuel and lubricants used in air traffic.

MS. Department of State, file 579.6AE1/84.

In discussing the advisability of participation in the conference by the United States, the Treasury Department pointed out the state of the existing law in the United States, saying:

"... this Government has made provisions [section 705 of the Revenue Act of 1938, amending section 630 of the Revenue Act of 1932, 48 Stat. 256; 52 Stat. 570], effective July 1, 1938, to exempt from the Federal excise taxes all liquid fuels and lubricants used as fuel supplies, ships' stores, sea stores, as legitimate equipment on civil aircraft employed in foreign trade and registered in a foreign country, provided such foreign country allows or will allow substantially reciprocal privileges in respect of aircraft registered in the United States." The Acting Secretary of the Treasury (Magill) to the Secretary of State (Hull), Sept. 15, 1938, MS. Department of State, file 579.6AE1/9.

The United States desired to have the scope of the convention broadened by including exemption privileges for (1) fuel and lubricants consumed between two or more landing points, (2) merchandise used as supplies and replacements, including spare parts and equipment, and (3) ground equipment, such as ground radio equipment, beaching gear, servicing platform, tools, meteorological and other aids. It also proposed relief from double income taxation on earnings derived from operation of aircraft. The Counselor of the Department of State (Moore) to the Second Secretary of the Embassy in London (Williamson) and the Treasury attaché in London (Kennedy), Jan. 27, 1939, MS. Department of State, file 579.6AE1/42.

Concerning these proposals, the American Delegates reported:

"Although the conference was quite willing to add to its agenda the four points enumerated in the Department's telegram No. 56 of January 21, 1 p.m. [MS. Department of State, file 579.6AE1/37], it was unable to agree to incorporate any one of the proposals in the body of the final Convention. Nevertheless, the conference adopted two resolutions in the Final Act recommending that the delegates to the conference bring to the attention of their respective Governments the four proposals in question." Messrs. William-

son and Kennedy to Secretary Hull, Mar. 2, 1939, MS. Department of State, file 579.6AE1/67. The convention has not yet been ratified by any state. On July 17, 1939 Denmark notified the British Foreign Office of her accession to the convention.

PRIVATE AIR LAW

§367

For the purpose of studying questions of private international air law and formulating a code embodying such law, there was created, as the result of a motion adopted at the International Conference on Private Air Law which convened in Paris in 1925, an organization known as the *Comité International Technique d'Experts Juridiques Aériens* (International Technical Committee of Aerial Legal Experts), commonly referred to as the C.I.T.E.J.A. States participating in this organization have appointed experts who act as an international drafting committee and prepare projects of conventions for reference to periodic diplomatic conferences. C.I.T.E.J.A.

Participation by the United States in the work of this Committee was authorized by a joint resolution of Congress approved Feb. 14, 1931 (46 Stat. 1162), amended Aug. 7, 1935 (49 Stat. 540). The American section of the Committee is now composed of five persons appointed with the approval of the President. An advisory committee composed of representatives of various organizations in the United States, to which the American section may refer pending drafts, has been formed. Secretary Hull to President Roosevelt (undated), MS. Department of State, file 579.6LA/48.

The convention for the unification of certain rules relating to international transportation by air, the convention for the unification of certain rules relating to precautionary attachment of aircraft, the convention for the unification of certain rules relating to liability for damages caused by aircraft to third parties on the surface, and the convention for the unification of certain rules relating to assistance and salvage of aircraft at sea have resulted from the work of the C. I. T. E. J. A.

Another organization carrying on the study of private international air law is the *Comité Juridique International de l'Aviation*, which is purely a private association of lawyers, professors, magistrates, etc. It has no governmental connection; its periodic congresses are held under the patronage of the government in whose territory they convene.

See the Counselor of the Embassy in Paris (Armour) to the Secretary of State (Hull), no. 1386, Mar. 27, 1931 (translation, enclosure 2), MS. Department of State, file 579.6LA/168; the Assistant Secretary of State (Castle) to the Secretary of War (Davis), Apr. 13, 1928, *ibid.* 579.6D8/3.

As a result of the Second International Diplomatic Conference on Private Air Law held in Warsaw in 1929, a convention for the unification of certain rules relating to international transportation by air was signed. It is based on a draft prepared by the International Technical Committee of Aerial Legal Experts and deals with the liability

Warsaw
convention

of the carrier by air for delay, injury, or death of passengers, and for delay, damage, or destruction of baggage or freight.

Limitation of Liability

It is observed that Article 20 of the proposed convention in regard to international transportation by air limits the liability of the carriers of merchandise and baggage by exempting them from liability if they can prove that the damage arose from a fault of piloting, of handling the aircraft, or of navigation, and that in all other respects the carrier and his agents have taken all necessary measures to prevent the damage. . . . this would seem to constitute a definite departure from the common law rule of liability upon carriers The principle of exemption from liability contained in paragraph 2 of Article 20 of the proposed convention in regard to the liability of the carrier seems, however, to be similar to the principle of exemption of ship owners from liability found in Section 3 of the Harter Act, 27 Stat. 445. . . .

The principle of exemption . . . also appears to be similar to provisions of paragraphs 1 and 2 of Article 4 of the Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, which was transmitted by the President to the Senate in February, 1927, and is now pending in the Senate awaiting action by that body. [The latter convention was ratified by the President on May 26, 1937. 51 Stat. 233, 4 Treaties, etc. (Trenwith, 1938) 4935.]

The Assistant Secretary of State (White) to the Secretary of Commerce (Lamont), Dec. 21, 1931, MS. Department of State, file 579.6L2/75.

Applicability

. . . the convention referred to [the Warsaw convention] does not grant any right to navigate aircraft and . . . it in no way restricts the freedom of action of the contracting parties in the matter of preventing aircraft from flying over prohibited areas. . . .

The right to navigate aircraft of one country in territory of another country is covered by international conventions within the domain of public international law, such as the International Convention for the Regulation of Aerial Navigation, signed at Paris on October 13, 1919, and the Convention on Commercial Aviation adopted at the Sixth International Conference of American States at Habana, Cuba, on February 20, 1928. These are multilateral conventions. The right to navigate aircraft is also covered by numerous bilateral air navigation agreements which are also within the domain of public international law. It is the usual practice for the contracting parties to reserve in such agreements the right to prohibit air navigation over restricted areas already established or which may be established during the life of the particular agreement.

The International Convention for the Unification of Certain Rules Relating to Transportation by Air, signed at Warsaw on October 12, 1929, is within the domain of private international law. It lays down certain rules for the transportation of passengers and merchandise and relates to such matters as passenger tickets, baggage checks and aerial way bills and establishes the rule of limitation of the liability of the aerial carrier for the

death or injury of passengers or the loss of baggage. The convention establishes rules that are to apply in cases where transportation by air has been authorized by the countries over which the lines operate.

The Assistant Secretary of State (Moore) to the Secretary of the Navy (Swanson), Nov. 23, 1933, MS. Department of State, file 579.6L2/140.

On March 23, 1934 the President transmitted the Warsaw convention to the Senate, accompanied by a report to him from the Secretary of State. The report contained the following comments:

Submission
to Senate

It is provided in Article 1 of the Convention that the Convention shall apply to international transportation of persons, baggage or goods performed by aircraft for hire or to gratuitous transportation performed by an air transportation enterprise. It is provided further in the first paragraph of Article 2 that the Convention shall apply to transportation performed by the state or by legal entities constituted under public law provided the transportation falls within the conditions laid down in Article 1. However, it is provided in the additional protocol to the Convention that the High Contracting Parties reserve to themselves the right to declare at the time of ratification or of adherence that the first paragraph of Article 2 of the Convention shall not apply to international transportation by air performed directly by the State, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty or authority. It is recommended that the Senate be asked to give its advice and consent to adherence to the Convention on the part of the United States subject to a declaration to be made on behalf of the Government of the United States in its instrument of adherence that the first paragraph of Article 2 of the Convention shall not apply to international transportation that may be performed by the United States or any territory or possession under its jurisdiction.

Through an inadvertence, the words "du transporteur" (from the carrier) were used in the first paragraph of Article 15 of the French text of the Convention, at the time of its adoption and signature, where the words "de l'expéditeur" (from the consignor) should have been employed. The Polish Government as the depositary of the signed Convention has taken steps to have the interested governments agree to the substitution of the words "de l'expéditeur" for the words "du transporteur". It is recommended, therefore, that should the Senate give its advice and consent to adherence to the Convention on the part of the United States it do so with the understanding that the French text of the first paragraph of Article 15 shall be amended by the substitution therein of the words "de l'expéditeur" for the words "du transporteur" in the fourth line of the paragraph, so that the word *consignor* can be substituted for the word *carrier* where it now appears in the English translation of the phrase "du transporteur".

It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.

It is provided in Article 20 (Chapter III) of the Convention that in the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage. This provision is analogous to the rule of maritime law under which the owner of a vessel who exercises due diligence to make the vessel seaworthy and to have it properly manned, equipped and supplied is not liable for damage resulting from faults or errors in navigation or in the management of the vessel. In view of the difficulties of international air transportation which involves navigation under uncertain atmospheric conditions over land and sea it is believed to be reasonable to apply this principle of maritime law to the navigation of aircraft.

Secretary Hull to President Roosevelt (undated), MS. Department of State, file 579.6L2/189.

**U.S.
adherence**

On June 15, 1934 the Senate gave its advice and consent to adherence with a reservation. The President declared the adherence of the United States on June 27, 1934, and, on July 31, 1934, the American Ambassador in Warsaw deposited the instrument of adherence with the Polish Minister for Foreign Affairs, subject to the reservation "that the first paragraph of Article II of this Convention shall not apply to international transportation that may be performed by the United States of America or any territory or possession under its jurisdiction".

Ambassador Cudahy to Secretary Hull, no. 365, July 31, 1934, MS. Department of State, file 579.6L2/217. Treaty Series 876; 49 Stat. 3000; 4 Treaties, etc. (Trenwith, 1938) 5250.

The convention has been ratified by a number of states. It has also been adhered to by several others, including the United States. There have been numerous adherences, in accordance with the provision of article 40(2) that any high contracting party may adhere separately in the name of all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority.

The translation of the word *dol* as used in article XXV caused difficulty. The British Delegate at the Conference in 1929 announced that the English equivalent of the word *dol* would be "wilful misconduct". This translation was accepted by the Department of State. The Chairman of the American Delegation to the Third International Conference on Private Aerial Law reported that he and the Chairman of the British Delegation to that Conference had reached the conclusion that "wilful misconduct" is probably "the best English translation of a word which has a very technical meaning in French and other continental jurisprudence".

The Third Secretary of the Legation at Warsaw (Werlich) to the Secretary of State (Hull), enclosure in despatch 2711, Oct. 16, 1929, MS. Department of State, file 579.6L2/35; memorandum of the Chief of the Treaty Division of the Department of State, May 14, 1937, *ibid.* /346; the Chairman of the American Delegation to the Third International Conference on Private Aerial Law (Cooper) to Mr. Hull, Aug. 19, 1933, *ibid.* 579.6L3/85.

In 1939 the British Embassy informed the Secretary of State that the question of the interpretation of article 1(2) had arisen in English courts and that a majority of the House of Lords had held that "the expression 'High Contracting Party' in the definition contained in Article 1(2) includes a Party which has signed the convention but has not ratified it". Article 1(2) provides that "international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention". The Embassy stated that "His Majesty's Government are of the opinion that the ordinary meaning of High Contracting Party in a convention is to designate a party who is bound by the provisions of a convention and therefore does not cover a signatory who does not ratify it", and that they wished to be assured that the Government of the United States shared that view. The Department of State expressed its concurrence in this view.

Interpre-
tation

The British Ambassador (Lindsay) to the Secretary of State (Hull) no. 234, June 15, 1939, MS. Department of State, file 579.6L2/382; Treaty Series 876; 49 Stat. 3014; 4 Treaties, etc. (Trenwith, 1938) 5251; Mr. Hull

to the British Ambassador (the Marquess of Lothian), Oct. 6, 1939, MS. Department of State, file 579.6L2/388.

The decision to which the British Embassy referred in its note was embodied in the case of *Philippson, and others, Appellants v. Imperial Airways, Limited, Respondents*. The meaning of "High Contracting Parties" as used in the Warsaw convention was discussed in the consideration of the questions whether the carriage on which the suit was based was "international carriage" and whether the suit was barred by the statute of limitations. If the carriage contracted for was "international carriage", the applicable period of limitation was two years; if the carriage was not international carriage within the meaning of the Warsaw convention, the period of limitation was six months. Action was begun more than six months and less than two years after the cause of action arose.

Gold consigned for carriage by air from an airport in England to an airport in Belgium had been stolen from the custody of the Imperial Airways on the night of Mar. 5, 1935. At that time the Warsaw convention was in force in Great Britain by reason of ratification in 1933. Belgium, although she had signed the convention, had not yet ratified it. Among the special conditions of carriage referred to in the consignment note was the provision that international carriage should mean carriage in which "the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties to the Convention of Warsaw for the unification of certain rules relating to International Air Transport of the 12th October 1929 upon which these conditions are based, or within the territory of a Single Contracting Party if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is a non-contracting Power".

Lord Atkin concluded:

"I find it impossible to make sense of these provisions, except by giving High Contracting Parties the meaning of signatories, extending it to non-signatories who take advantage of the provisions as to accession. It is all the signatories who have a right to a certified copy under art. 36, to be given notice of deposit of ratification and the date on which the Convention comes into force under art. 37, paras. 1 and 2. 'As soon as this Convention shall have been ratified by five of the High Contracting Parties' cannot mean 'ratified by five of the five who have ratified.' All the signatories are entitled to notice of accession under art. 38, and any of them may denounce the Convention whether they have ratified or not and all of them are entitled to information of denunciation under art. 39. While art. 40 makes that certain, which was plain enough before, for it provides for a declaration by 'any High Contracting Party at the time of signature.' This article also makes plain that a State which accedes is a High Contracting Party, for it expressly calls him so.

"If, therefore, there were any doubt as to the meaning of High Contracting Party in diplomatic usage, this Convention has provided its own dictionary. I, therefore, am driven to the conclusion that the words in art. 1 of the general conditions have the same meaning as they have in arts. 36, 37, 38, 39 and 40 of the Convention and mean signatories. It is a perfectly correct use of the phrase; the parties have concluded a Convention by their plenipotentiaries, and though they are not to be bound by the Convention as a

whole until they have ratified, yet before ratification they have the rights and duties given to them by the articles above mentioned; and as pointed out by Oppenheim, 5th ed., vol. i., (v.), s. 510, the two stages of consent by signature and subsequent ratification are not to be confused; the consent is always by signature. I think, therefore, that international carriage in the Convention is intended to be defined as carriage to and from the territory of the signatories whether they do or do not eventually become bound to make the provisions of the Convention part of their domestic law."

Lord Wright reached the same conclusion.

The majority of the House of Lords held that the action was not barred under the limitation of actions contained in the Warsaw convention. However, the majority of the court did not agree that Belgium was a high contracting party. Lord Thankerton agreed in the decision that the case was not barred by the statute of limitations but expressly stated that he thought that the term *high contracting party* could be applied only "to those which have bound themselves by ratification". He based his decision in the case on the point that the contract of carriage was ambiguous and that the respondents who had prepared the contract must suffer the consequences of their failure to make the limitation clear. The two remaining judges, Lord Russell of Killowen and Lord MacMillan, reached the decision that Belgium was not a high contracting party and that the case should be dismissed. [1939] A.C. 332, 160 L.T.R. 410, 55 T.L.R. 490 (1939) [reversing 158 L.T.R. 470, 54 T.L.R. 523 (1938); and affirming 157 L.T.R. 112, 53 T.L.R. 850 (1937)]. For a further discussion of the case, see the chapter on "Treaties", §491 of this Digest.

In the case of *Grein v. Imperial Airways, Limited*, the court considered the meaning of the term "international carriage" as used in article 1(2), *ante*. The case arose out of a claim for damages for the death of a passenger caused by an accident occurring on the return trip of a journey from London to Antwerp. At the time of the flight Great Britain was a party to the Warsaw convention, but Belgium was not. The court held, with one dissent, that a carriage beginning at an airport within the territory of a contracting party, continuing to an agreed point in the territory of a non-contracting party, and returning to the place of original departure, constituted an international carriage within the meaning of the convention. Greene, L.J., said:

"... The rules are rules relating not to journeys, not to flights, not to parts of journeys, but to carriage performed under one (or in cases falling under para. 3 more than one) contract of carriage. The contract (or under para. 3 the series of contracts) is, so to speak, the unit to which attention is to be paid in considering whether the carriage to be performed under it is international or not.

"It is next to be observed that the fact that there is a break in the carriage is immaterial. In other words, once the contract is ascertained to be a contract for the class of carriage described, it matters not that the journey is broken."

[1937] 1 K.B. 50, 77-78, 155 L.T.R. 380, 388, 52 T.L.R. 681, 689 (1936) [reversing 154 L.T.R. 31, 52 T.L.R. 28 (1935)].

See also: *Société anonyme de navigation aérienne c. Palleroni et consorts*, Cour de cassation, 1^{re} section, Mar. 31, 1938, *Revue aéronautique internationale*, Sept. 1938, 258, holding that under article 36 of Italian

Royal Decree 1733 (identical with article 20 of the Warsaw convention) the "diligence" required of an air-carrier in order to avoid damage is the "diligence of a good father" and that merely doing what the carrier would do habitually or simply taking measures to obtain a certificate of navigability, is not sufficient; *Aslan v. Imperial Airways Limited*, 149 L.T.R. 276, 49 T.L.R. 415, 45 Ll. L.Rep. 316 (K.B. Div., 1933), holding that, in view of the provisions of the consignment note, the air-traffic company was not acting as a common carrier, that there was no warranty of fitness such as is implied in the warranty of seaworthiness of a ship, and that there was no warranty to provide a bullion room aboard; and *Westminster Bank Limited v. Imperial Airways Limited*, 155 L.T.R. 86, 52 T.L.R. 607, 55 Ll.L.Rep. 242 (K.B. Div., 1936), holding that a statement in the consignment note that the carriage is subject to certain general conditions based upon the Warsaw convention was not a statement that the carriage is subject to the rules relating to liability established by the convention, as required by article 5 of the Carriage by Air Act of July 12, 1932 (22 and 23 Geo. V, c. 36).

Two conventions, the convention for the unification of certain rules relating to the precautionary attachment of aircraft and the convention for the unification of certain rules relating to damages caused by aircraft to third parties on the surface, were concluded at the Third International Conference on Private Air Law, which met in Rome in 1933.

Precautionary attachment

In the report of the chairman of the American Delegation the following general comment concerning the convention relating to precautionary attachment was made:

. . . Its primary purpose is, of course, to provide a uniform rule with reference to the conditions under which aircraft registered in one country, may be attached for debt before judgment entered, while flying through the territories of another country. The seizure of an aircraft engaged in regular transportation of passengers and property, necessarily delays such transportation and may result in serious inconvenience and loss. This Convention will prevent frivolous seizure of such aircraft.

The Convention defines precautionary attachment in a very satisfactory manner. It further provides that the government aircraft, including such aircraft while in postal service (but not such aircraft if used for commercial purposes) shall be exempt from precautionary attachment; that all aircraft put into service on regular public transportation lines and indispensable reserve aircraft and any other aircraft assigned to transportation of persons or property for hire, where ready to depart, shall be exempt from precautionary attachment. This will prevent holders of claims against regular transport lines upsetting the traffic on such lines by seizing the aircraft of such lines before the validity of the claim has been submitted to a competent court. Certain exceptions are provided, as for example, that the ex-

emption does not apply to debts contracted for the voyage or during the voyage by aircraft other than those put in service on regular line of public transport. A further exception is provided, that the exemption cannot be used against the owner of the aircraft who has been deprived of the possession of his aircraft by an illegal act and who attaches same.

The Convention also provides for giving of bond in cases of aircraft not exempt from precautionary attachment and provides that in all cases a decision must be reached by summary and rapid procedure on demand for release from the attachment.

It was felt by the American delegation at the Rome Conference, that the text of the Convention as finally adopted would be a very real advantage to owners and operators of American aircraft flying abroad, both those operating regular transport lines as well as other owners and operators. Accordingly the American delegation signed the final text of the Convention with a reservation, however, that the same should be applicable solely to the continental limits of the United States excluding Alaska.

The Chairman of the American Delegation to the Third International Conference on Private Aerial Law (Cooper) to the Secretary of State (Hull), Aug. 19, 1933, MS. Department of State, file 579.6L3/85. Department of State, Treaty Information Bulletin, no. 47 (Aug. 1933), p. 22; 192 League of Nations Treaty Series (1938) 289; VI Hudson, *International Legislation* (1937) 328.

The convention for the unification of certain rules relating to damages caused by aircraft to third parties on the surface, referred to *ante*, provides for the liability of the aircraft-owner and -operator for damage caused by the aircraft to persons or property on the surface. It has the dual purpose of limiting the extent of the liability of the owner or operator of the aircraft and of guaranteeing reasonable compensation to the injured person or the owner of the property which has been damaged. It imposes absolute liability on the owner or operator of the aircraft save in the case of contributory negligence of the injured party. However, it limits this liability in amount except where it is proved that the damage is caused by the gross negligence or wilful misconduct of the operator or his agents (unless the operator proves that the damage was caused by an error in piloting, operation, or navigation, or, in a matter affecting his agents, that he has taken all the proper measures to prevent the damage). If the operator has not furnished the sureties prescribed by the convention he may not claim the limitation of liability under the convention.

Liability for
damages
caused to
third persons

Department of State, Treaty Information Bulletin, no. 47 (Aug. 1933), p. 27; VI Hudson, *International Legislation* (1937) 334.

Concerning the liability to third persons on the ground for injury to their persons or property and insurance covering such liability, the Department of State instructed the delegates to the 1933 conference:

U.S.

. . . The status of such liability has never been clearly determined in the United States. It has been contended that under the common law and without statute the rule in the United States is and should be that the owner or operator of aircraft is responsible for damages caused to third persons on the ground by the falling of an aircraft only when it is proven by the injured person that the injury was caused through the negligence of such owner or operator of such aircraft. On the other hand, in approximately twenty States of the United States, the rule has been changed by statute and the liability of the owner of the aircraft has been held to exist from the mere fact that the injury was caused to third persons on the ground through the flight of such aircraft or because of some object being thrown from or falling from such aircraft. . . . the rule of absolute liability for damages to third parties on the ground has never been finally and definitely accepted in the United States as the proper rule of damages.

Compulsory insurance

. . . Compulsory insurance is almost unknown in the United States. It exists in one or two states in connection with the issuance of automobile licenses. In those states there is no uniformity of opinion as to whether it has worked well. The application of compulsory insurance to aircraft is a far-reaching experiment. Its cost may seriously deter private operation of aircraft except for the wealthy. On the other hand, it is realized that proper protection should be given innocent third persons on the ground who, for instance, may be injured by falling aircraft and whose property may be seriously damaged thereby.

The Assistant Secretary of State (Carr) to John C. Cooper, Jr., May 1, 1933, MS. Department of State, file 579.6L3/46.

Protocol on insurance

Delay arose in the general ratification of the Rome convention last discussed because of difficulties having to do with the defenses, if any, that should be allowed insurers against the payment of insurance claims. A protocol relating to insurance was drawn up at the Fourth International Conference on Private Air Law, held in Brussels in 1938. The Secretary of State, in his instruction to the Delegates of the United States, expressed himself as opposed to suggested provisions of the protocol giving the insurer defenses for acts over which the injured third party could have no control. He also instructed the Delegates to "advocate the right of option in the matter of insurance under the Rome Convention", i.e., "the Delegation should take the position that Article 12 of the Rome Convention considered in connection with paragraph (b) of Article 14 means that each country a

party to the Convention may determine whether the aircraft of other Contracting Parties entering its territory must be insured within the limits and under the conditions enumerated in the Rome Convention and thus be entitled to a limitation of liability as provided for in the Convention, or whether it will allow such foreign aircraft to enter its territory without such insurance and thus be subject to unlimited liability”.

The Secretary of State (Hull) to the Chairman of the Delegation of the United States of America to the Fourth International Conference on Private Air Law (Mason), Sept. 2, 1938, MS. Department of State, file 579.6L4/194½.

The Brussels protocol, which is to “form an integral part of the convention . . . concluded at Rome on May 29, 1938”, provides that the insurer may interpose the following defenses: (a) The damage occurred after the insurance ceased to have effect; (b) the damage occurred outside of the territorial limits provided for by the insurance contract, unless such flight was caused by *force majeure*, by the fact of assistance to those in peril, justified by circumstances, or by an error in piloting, in the handling of the aircraft, or in navigation; and (c) the damage is the direct consequence of international armed conflict or of civil disturbances. It is further provided that “From the point of view of the application of clauses (a) and (b), third parties may, where there is a discrepancy between the statements in the certificate of insurance or in the aircraft papers, and the stipulations of the insurance contract, avail themselves of the statements in the certificate or in the said papers as to the duration of the insurance contract and as to its territorial extent.” In its report to the Secretary of State, the American Delegation pointed out with reference to the latter provision that “should the United States ever ratify the Rome Convention and protocol thereto, serious difficulties of an administrative nature would be involved in any undertaking by the authorities of the Government of the United States to issue certificates of insurance or to have notations made on the aircraft papers with respect to aircraft departing for territory of any of the countries which may be parties to the Rome convention”. The delegation also pointed out that while it endeavored to have the Conference embody in the protocol an interpretation of articles 12 and 14 of the Rome convention along the lines suggested in its instructions, the Conference was unwilling to consider the proposed interpretation, apparently on the ground that it raised a fundamental question affecting the substance of the Rome convention not contemplated in the agenda.

Fourth International Conference on Private Air Law, Brussels, Sept. 1938: Report of the American Delegation to the Secretary of State (Department of State Conference Ser. 42, 1939) 22-24, 83.

Salvage
at sea

The Fourth International Conference on Private Air Law, held in Brussels in September 1938, adopted a convention for the unification of certain rules relating to assistance and salvage of aircraft or by aircraft at sea. Article 2 provides:

(1) Any person exercising the functions of commanding officer aboard an aircraft shall be bound to render assistance to any person who is at sea in danger of being lost, so far as such person may do so without serious danger to the aircraft, her crew, her passengers, or other persons.

(2) Every captain of a vessel shall be bound, under the circumstances contemplated in paragraph (1), and without prejudice to more extended obligations imposed upon him by the laws and conventions in force, to render assistance to any person who is at sea in danger of being lost on an aircraft or as the consequence of damage to an aircraft.

(3) For the purposes of this convention, assistance shall mean any help which may be given to a person who is at sea in danger of being lost, even by merely giving information, consideration being given to the different conditions under which maritime navigation and air navigation operate.

(4) The obligation of assistance shall not exist unless the aircraft or the vessel is in the course of a trip or ready to depart, and unless it is reasonably possible for it to render useful aid.

(5) The obligation of assistance shall cease when the person who is under such obligation becomes aware that assistance is being rendered by others under similar or better conditions than it could be by himself.

(6) The national legislations shall determine the penalties designed to insure the execution of this obligation, and the high contracting parties shall communicate to each other, through diplomatic channels, the texts of such laws.

(7) No liability can rest with the owner or the *armateur* of the vessel or with the owner or operator of the aircraft, as such, by reason of failure to discharge this obligation, except in the case where he shall have ordered the person bound to render assistance not to render it.

Article 3 provides for indemnity, based on expenses justified by the circumstances and on the damage suffered in the course of the operations, and limits the amount thereof to 50,000 francs for each person saved and to a total of 500,000 francs in all, or, if no person has been saved, to 50,000 francs. Remuneration not to exceed the value of the property salvaged at the conclusion of the salvage, provided for in arti-

cle 4, is determined on the basis of the measure of success, the efforts and deserts of those who have rendered assistance, the danger run by the aircraft assisted, by her passengers, her crew, and her cargo, by the salvors and by the salving aircraft or vessel, the time consumed, the expenses incurred, the losses suffered, and the risks of liability and other risks run by the salvors, the value of the property risked by them, consideration being given to the special adaptation, if any, of the assister, and the value of the things salvaged, provided the services rendered have a useful result. Subsequent articles provide for the payment and distribution of indemnity and remuneration and the bringing of actions therefor.

Fourth International Conference on Private Air Law, Brussels, Sept. 1938: Report of the American Delegation to the Secretary of State (Department of State Conference Ser. 42, 1939), annex J, pp. 75, 76.

"The [American] Delegation urged . . . that existing maritime principles should be applicable, so far as concerned the obligation placed upon sea-going vessels to render assistance under the proposed convention. While the convention as finally adopted by the Conference does not contain the specific provisions on this point proposed by the American Delegation, it is nevertheless believed that the obligation placed upon the masters of vessels under article 2 of the convention as adopted at Brussels will not in practice result in undue hardships, particularly in view of the retention in article 2 of the provision of article 2 of the CITEJA draft, which in effect gives to the masters of vessels the right to limit assistance to cases where there is the possibility of rendering useful aid.

"The Delegation made a determined effort to have the obligation on commanders of aircraft to render assistance removed, but while its proposals on the subject were given sympathetic consideration, it was met with the argument that to remove entirely the obligation on commanders of aircraft to assist vessels and aircraft, while at the same time imposing an obligation on vessels to assist aircraft, would in all probability be considered by shipping interests to be a discrimination against them. However, it was made clear from the discussions in the special drafting committee on salvage that there was no intention to impose upon an aircraft any obligation to assist that would be unreasonable, taking into consideration the limited nature of assistance that an aircraft might feasibly be able to render. For instance, it might be found that if an aircraft did nothing more than to signal the position of an aircraft or vessel in distress, this might under the circumstances of the case satisfy the requirements of the salvage convention. This view of the matter is borne out by the . . . provision inserted as paragraph (3) of article 2 of the convention.

" . . . It was stated . . . in the instructions to the Delegation that it was the view of the Government of the United States that article 13 of the CITEJA draft should be redrafted to read as follows: 'This convention does not apply to government aircraft or ships appropriated exclusively to a public service.'

"The Delegation submitted a proposal in accordance with its instructions, and stated in this connection that no reason was seen for departing from the principle embodied in article 14 of the maritime salvage convention of 1910, to the effect that the convention would not apply to government ships appropriated exclusively to a government service. It was stated further that no reason was seen why this rule should not be extended to apply to aircraft appropriated exclusively to a public service, and that, notwithstanding the reservations in article 13 of the CITEJA draft, it was believed that in the proposed convention which contained new and novel provisions with respect to assistance and salvage, a safer plan would be to exclude from the application of the proposed convention all aircraft and ships appropriated exclusively to a public service.

"The provisions relating to the application of the convention to government ships and aircraft as finally adopted by the conference are substantially in accord with the American proposal. These provisions appear in article 16 of the convention as approved by the Conference. Article 16 reads:

" 'This convention shall, with the reservation of the provisions of article 13 relative to jurisdiction, apply to government vessels and aircraft, with the exception of military, customs, and police vessels or aircraft, to which the rights and obligations flowing from the foregoing provisions shall not apply.'

"It is believed that the practical effect of article 16 is that the convention as adopted would not apply to aircraft or ships 'appropriated exclusively to a government service', except perhaps to the extent that there may be classifications of government ships and aircraft employed exclusively in the government service other than military, customs, and police aircraft and ships. It appears, however, that article 16 as adopted by the Conference would apply to aircraft or vessels operated commercially by a government."

Fourth International Conference on Private Air Law, Brussels, Sept. 1938: Report of the American Delegation to the Secretary of State (Department of State Conference Ser. 42, 1939) 8, 9, 10, 15.

In September 1932 a seaplane, which had been compelled by stress of weather to descend on the sea near Greenland and which had sent out an SOS message, succeeded in reaching a rocky island on which its passengers landed. The island was devoid of any life, shelter, or vegetation. A British fishing-vessel answered the SOS and picked up the passengers. An action was brought by the master of the vessel against the owners of the American seaplane for salvage. The Aberdeen Sheriff Court held that—

my conclusions relative to the legal aspects . . . may thus be summed up: (1) At common law a British ship rescuing from the perils of the sea an aircraft or its passengers, crew or cargo whether British or foreign whether within or without his Majesty's jurisdiction is not entitled to salvage for services rendered, as such aircraft is not within the category of ships, vessels or boats; (2) a British ship rescuing an aircraft or its passengers, crew or cargo wrecked at sea or on shore is, in virtue of the provisions of Sect. 11 of the Air Navigation Act, 1920, entitled

to the benefit of "the law relating to wreck and to salvage of life or property" provided that the aircraft whether British or foreign has been wrecked within the limits of his Majesty's jurisdiction; (3) a British ship rescuing a foreign aircraft, its passengers, crew or cargo wrecked at sea or on shore outwith the jurisdiction of his Majesty is not entitled to the benefit of "the law relating to wreck and to salvage of life or property," as the Air Navigation Act does not apply to aircraft operating outwith his Majesty's jurisdiction.

Watson v. R.C.A. Victor Company, Inc., 50 Ll. L. Rep. 77, 80 (1934). But see sec. 11, Fifth Schedule, British Air Navigation Act of 1936, placing aircraft on a footing with vessels for purposes of salvage. 26 Geo. V & 1 Edw. VIII.

BILATERAL AGREEMENTS

§368

The United States has entered into a number of bilateral arrangements with other countries for the facilitation of air navigation. There are generally speaking three types of such agreements, namely: (1) air-navigation agreements governing flight between the two countries, (2) pilots' licensing agreements governing the issuance of pilot licenses to operate civil aircraft, and (3) agreements for the reciprocal recognition of airworthiness certificates for imported aircraft.

The first arrangement entered into by the United States was that with Canada in 1929. It contained provisions covering each of the three subjects. Ex. Agree. Ser. 2. In subsequent negotiations with other countries it was found desirable to negotiate separate arrangements for each of the subjects. On July 28, 1938 notes were exchanged between the United States and Canada, effective on August 1 of that year, by which three new arrangements, relating respectively to the three subjects enumerated above, to supersede the arrangement of 1929, were agreed upon. Ex. Agree. Ser. 129, 130, and 131.

Beginning in 1920 and prior to 1929, air navigation between the United States and Canada was governed by informal arrangement, usually renewed every six months and made reciprocal in 1927. The Assistant Secretary of State (Moore) to J. Gordon Nelles, July 18, 1935, MS Department of State, file 711.4227/88.

In an extra to the *Canada Gazette* of May 13, 1940 there were published "The Defence Air Regulations, 1940" (P.C. 1890) to control the flying of civil aircraft in Canada during war. The regulations provide that no foreign civil aircraft shall be flown over Canada or Canadian waters unless (1) it is operated on an international scheduled air-transport service licensed by the Minister of Transport, (2) it alights and reports to customs and immigration inspectors at specified customs airports or at other designated points to which advance notice has been given, or (3) it alights and reports at other ports of entry or other points in Canada for which permission has been obtained in advance to enter and clear through customs and immigration.

Prior to "The Defence Air Regulations, 1940" the regulations governing the flying of civil aircraft in Canada during war were contained in an Order in Council (P.C. 2483) of Sept. 3, 1939 and in "The Defence Air Regulations, 1939". These regulations prohibited flight of foreign civil aircraft other than those flying in international scheduled transport services unless permission for entry into Canada had been given by the District Inspector of Civil Aviation of the Department of Transport into whose district it was proposed to fly such aircraft. Although the Department of External Affairs of Canada did not believe that the war regulations restricted the operation of the air-navigation agreement between the United States and Canada, the Department of State and the Civil Aeronautics Authority of the United States concluded that the effect of the regulations was to suspend operation of the agreement; therefore during the existence of the 1939 regulations Canadian civil aircraft were required to obtain advance permission for flight over the United States. Concluding that the 1940 regulations restored the privileges enjoyed by United States aircraft under the air-navigation agreement between the United States and Canada, the Civil Aeronautics Authority ceased to impose such restrictions on Canadian civil aircraft.

The Minister to Canada (Cromwell) to the Secretary of State (Hull), no. 380, May 15, 1940 (enclosure), MS. Department of State, file 711.4227/234; the *Chargé d'Affaires* ad interim at Ottawa (Simmons) to Mr. Hull, no. 440, Oct. 2, 1939 (enclosure), *ibid.* /215; Mr. Simmons to Mr. Hull, no. 658, Dec. 12, 1939 (enclosure), *ibid.* 842.7961/72; *Canada Gazette*, Dec. 9, 1939 (P.C. 3987); the Third Secretary of Legation (English) to Mr. Hull, no. 700, Dec. 29, 1939, and the Counselor of the Department of State (Moore) to Mr. Cromwell, no. 41, Mar. 5, 1940, MS. Department of State, 711.4227/228; the Chairman of the Civil Aeronautics Authority (Hinckley) to Mr. Hull, June 20, 1940, *ibid.* /236.

For the facilitation of civil aeronautics and civil air navigation between the United States and Canada there was concluded by an exchange of notes on Feb. 20, 1939 a United States-Canadian regional agreement governing the use of radio for civil aeronautical services. This arrangement provides for the standardization and use of aeronautical radio facilities and for the regulation of radio facilities used in the furtherance of aviation. *Ex. Agree. Ser. 143.*

An arrangement similar to the 1929 arrangement with Canada was entered into by the United States and Italy by notes exchanged between the two Governments on Oct. 13 and 14, 1931. *Ex. Agree. Ser. 24.*

Air-navigation arrangements have also been concluded by exchange of notes between the United States and Germany (June 1, 1932), Sweden (Oct. 9, 1933), Norway (Nov. 15, 1933), South Africa (Sept. 20, 1933), Denmark (Apr. 16, 1934), Great Britain (May 6, 1935), Irish Free State (Dec. 4, 1937), Liberia (June 15, 1939), and France (Aug. 15, 1939). *Ex. Agree. Ser. 38, 47, 50, 54, 58, 76, 110, 166, and 152.*

An agreement relating to commercial aviation in Colombia, the United States, and the Canal Zone was concluded by an exchange of notes on Feb. 23, 1929. Department of State, Mimeographed Press Release, Feb. 23, 1929; Colombia, *Informe del Ministro de Relaciones Exteriores al Congreso de 1929*, p. 50.

Arrangements for the issuance of pilot licenses to operate civil aircraft have also been effected between the United States and Sweden (Oct. 9, 1933), Norway (Nov. 15, 1933), South Africa (Sept. 20, 1933), Denmark

(Apr. 16, 1934), and Great Britain (May 5, 1935). Ex. Agree. Ser. 48, 51, 55, 59, and 77.

Arrangements for the reciprocal recognition of certificates of airworthiness for imported aircraft have been concluded between the United States and Germany (June 1, 1932), Belgium (Nov. 21, 1932), Sweden (Oct. 9, 1933), Norway (Nov. 15, 1933), Denmark (Apr. 16, 1934), and Great Britain (Oct. 17, 1934). Ex. Agree. Ser. 39, 43, 49, 52, 60, and 69.

The United States has also entered into an arrangement with New Zealand relating to the importation into New Zealand of aircraft and aircraft components manufactured in the United States. It provides, in general, that the authorities of New Zealand will confer the same validity upon certificates of airworthiness of aircraft for export issued by the authorities of the United States as if such certificates had been issued pursuant to the regulations of New Zealand. Ex. Agree. Ser. 167.

The State Department holds that none of the aviation executive agreements between Great Britain or Canada and the United States, relating to the operation of civil aircraft, is applicable to the Philippine Islands and that therefore an English or Canadian national is not entitled to a license for the piloting of civil aircraft in the Philippines under the provisions of those agreements.

The Secretary of State (Hull) to the Secretary of War (Woodring), Nov. 12, 1938, MS. Department of State, file 711.4127/196.

In 1933 the Department of State informed the German Ambassador that ship-to-shore airplane service from German steamships to New York constituted a regular air route within the meaning of paragraph 2 of article 4 of the air navigation agreement between the United States and Germany and that therefore the carrying on of such service was subject to the prior consent of the United States on the basis of reciprocity.

Ship-to-shore service

The Assistant Secretary of State (White) to the German Ambassador (Luther), May 13, 1933, MS. Department of State, file 800.8810 North German Lloyd/40.

Arrangements between the United States and Canada and the United States and France for the facilitation of air-transport services were entered into in 1939. The arrangement with Canada applies to Canada and continental United States, including Alaska. The arrangement with France provides that aircraft of French or American registration belonging to French or American air-carrier enterprises shall be permitted to operate in the territory of the other party in the conduct of trans-Atlantic air-transport service carrying passengers, goods, and mail. Both agreements provide that neither party shall impose restrictions or limitations as to airports, routes, connections, and general facilities which might be competitively or otherwise disadvantageous to the air-carrier enterprises of the other party, and that aircraft shall comply with the airworthiness require-

Air-transport services

ments of the country to which they belong. The transportation of mail is subject to a separate agreement.

Ex. Agree. Ser. 153 and 159.

By an exchange of notes dated Nov. 29, 1940 and Dec. 2, 1940 the Governments of the United States and Canada entered into an agreement giving effect to the provisions of the air-transport arrangement, by which it was provided that until Dec. 31, 1942 existing services in operation between the two countries should be confirmed, new services in general should be subject to disposition at the sole discretion of the appropriate agency of the Government before which applications were pending, and each Government should take steps to permit operation of air services in accordance with the routes and nationalities of carriers specified in the agreement. The Canadian Government was to cooperate in, permit, or undertake the establishment, on behalf of an American air-carrier, of necessary aids to air navigation along the coast of British Columbia. The Secretary of State (Hull) to the Chargé d'Affaires ad interim of Canada (Mahoney), Nov. 29, 1940, MS. Department of State, file 711.4227/239a; Mr. Mahoney to Mr. Hull, no. 379, Dec. 2, 1940, *ibid.* /240; Ex. Agree. Ser. 186.

Air-transport service between the United States and Great Britain was inaugurated pursuant to basic understandings reached in diplomatic discussions in 1935 and subsequently, and permits were issued by the Government of the United States to "Imperial Airways Limited, or a company in which Imperial Airways Limited holds a controlling interest" and by the Air Ministry of Great Britain, the Governor of Bermuda, the Minister of Transport of Canada, and the Minister of Industry and Commerce of the Irish Free State to the Pan American Airways. MS. Department of State, file 811.79640/120, /414, /373, /387, /374, /429. Operation under the permits began in 1939.

During the establishment of airlines in the South American countries the Government of the United States followed the policy of allowing the companies wishing to establish such lines to negotiate their own contracts with the countries in which they desired to fly, but the Government rendered diplomatic aid in facilitating negotiations. See MS. Department of State, file 810.79611 Pan American Airways.

Conventions and agreements relating to air navigation have generally dealt with civil aircraft only. Military aircraft are ordinarily required to have special permission for flight over foreign territory and are subject to strict regulations. Between 1922 and 1932 under general authorization from the Canadian Government military aircraft of the United States made flights across the peninsula of Ontario without obtaining special permission for each flight. During the same period Canadian aircraft, chiefly in connection with Canadian air-mail service, flew across the State of Maine under general authorization. Under another blanket authorization, American military aircraft flew over Canadian territory between Mount Clemens, Michigan, and Cleveland, Ohio, or Buffalo, New York; and Canadian military aircraft flew across the United States between Quebec and New Brunswick. The Assistant Secretary of State (Moore) to J. Gordon Nelles, July 18, 1935, MS. Department of State, file 711.4227/88.

On Apr. 25, 1941 ratifications were exchanged between the Governments of the United States and Mexico, bringing into effect an agreement between the two countries for the reciprocal transit of military aircraft through the territories and territorial waters of the countries. The agreement pro

vides for free transit of military airplanes and seaplanes without restriction as to type, number, frequency of flights, personnel, or material carried over routes determined by the Government over whose territory the aircraft are flown. The agreement provides that it shall be effective only for the duration "of the present state of possible threat of armed aggression against either of them [United States and Mexico] and, if so required, in the opinion of both Governments, by the needs of their mutual defense". Notification by either Government of the disappearance of the stipulated conditions is sufficient to terminate the concessions and obligations contained in the agreement. Treaty Series 971.

The procedure for obtaining permission for the flight of military planes over the territory of a foreign country is illustrated by the arrangements made with foreign governments for a flight around the world by United States Army airplanes in 1923 and 1924. See 1924 For. Rel., vol. I, pp. 227-246. Similar arrangements were made for the delivery to the United States of a zeppelin built in Germany by the German Government for the Government of the United States. 1924 For. Rel., vol. II, pp. 170-183.

LAWS AND REGULATIONS OF THE UNITED STATES

§369

Air navigation in the United States is regulated by the Air Commerce Act of 1926 as amended by the Civil Aeronautics Act of 1938. Much of the 1926 act was repealed by the Civil Aeronautics Act. Among the parts remaining are provisions of subdivisions (b) and (c) of section 6, by which it is provided that foreign aircraft not a part of the armed forces of a foreign nation may be navigated in the United States only if so authorized by the Civil Aeronautics Authority (now by the Administrator of Civil Aeronautics as to isolated flights and by the Civil Aeronautics Board as to regular, scheduled service, under Reorganization Plan No. IV, sec. 7 (b), effective June 30, 1940, 5 F.R. 2421, 2422). Such aircraft may be authorized to navigate in the United States if the foreign nation grants similar privileges in respect of aircraft of the United States and airmen serving in connection therewith. However, no foreign aircraft is permitted to engage in other than foreign commerce.

44 Stat. 568, 572; 52 Stat. 973, 1028; 54 Stat. 1234; 49 U.S.C. §176.

The Civil Aeronautics Act of 1938, section 1(21)(c), defines "foreign air transportation" as commerce between—

a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

52 Stat. 973, 979; 49 U.S.C. §401(21)(c).

Provisions relating to the transportation of airmail are contained in section 405 of the Civil Aeronautics Act of 1938 (52 Stat. 994; Airmail

49 U.S.C. §485). In subsection (d) the Postmaster General is authorized to make such rules and regulations as may be necessary for the safe and expeditious carriage of mail by aircraft.

Ports of
entry

Section 7, subdivision (a), of the Air Commerce Act of 1926 provides that the navigation and shipping laws of the United States shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft. By subdivision (b) of that section the Secretary of the Treasury is authorized to designate places in the United States as ports of entry, to detail to such ports of entry customs officers and employees, and to provide for the application to civil air navigation of the laws and regulations relating to the administration of the customs and public-health laws to such extent and upon such conditions as he may deem necessary. Subdivision (c) provides that the Secretary of Commerce may apply to civil aircraft the laws and regulations relating to the entry and clearance of vessels to such an extent and upon such conditions as he may deem necessary. Subdivision (d) authorizes the Secretary of Labor to designate any of the ports of entry for civil aircraft as ports of entry for aliens arriving by aircraft, to detail to such ports officers and employees of the immigration service, and to provide for the application to civil air navigation of the laws and regulations relating to the administration of the immigration laws to such an extent and upon such conditions as he deems necessary.

44 Stat. 572; 49 U. S. C. §177.

Reorganization Plan No. V, effective June 14, 1940, transferred the Immigration and Naturalization Service from the Department of Labor to the Department of Justice and provided that all functions and powers of the Secretary of Labor relating to the administration of the Immigration and Naturalization Service should be transferred to the Attorney General. 54 Stat. 1238; 5 F.R. 2223.

Note the following cases: *United States v. Batre*, 69 F. (2d) 678 (C.C.A. 9th, 1934), holding that the lien imposed under section 11 of the Air Commerce Act of 1926 for violation of the regulations of the Secretary of the Treasury designating ports of entry on the international border was paramount to a contractual lien held by the mortgagee of an airplane, landing in a field in Arizona which was not a port of entry, the mortgage contract having been entered into subsequent to the passage of the act; *United States v. One Pittcairn Biplane*, 11 F. Supp. 24 (W.D.N.Y., 1935), holding that where an airplane crossed the international boundary between the Western District of New York and Canada, in smuggling liquor from Canada to Ohio, but did not land in New York, the District Court of the United States for the Western District of New York had jurisdiction to order forfeiture of the plane, subsequently seized at Niagara Falls, New York, in an action brought under 19 U.S.C. §§ 482 and 483; *United States v. One Fairchild Seaplane et al. (Northwest Air Service, Inc., Intervener)*, 6 F. Supp. 579 (W.D. Washington, N.D., 1934), and *United States v. Northwest Air Service, Inc.*, 80 F. (2d) 804 (C.C.A. 9th, 1935), holding, on appeal, that a penalty lien in favor of the United States imposed under the Air Commerce Act of 1926 and the Tariff

Act of 1930 for failure to give advance notice of arrival, etc., was superior to a lien for repairs, made while the craft was subsequently stored in a hangar on dry land, which was held not to constitute a maritime lien as claimed; *United States v. Hunter*, 80 F. (2d) 968 (C.C.A. 5th, 1936), holding, where a monoplane arrived in the United States, in Apr. 1933, from the British West Indies, and it was subsequently alleged that the craft was liable for forfeiture under sections 459 and 460 of the Tariff Act of 1930, that the craft was not forfeitable because the sections related to "vessels and vehicles" arriving from "contiguous countries", and that regulations adopted, under section 7 (b) of the Air Commerce Act of 1926, by the Secretary of the Treasury, purporting to extend the penal provisions of the customs laws with reference to foreign contiguous territory to aircraft from any foreign country, were unwarranted; *John F. Pentz v. The King*, [1931] Ex. C.R. 172 (Dominion of Canada, Exchequer Court of Canada, 1931), 1936 U.S. Av. R. 294, holding that, where an American citizen flying over Ontario an airplane registered in the United States made a forced landing, repaired the trouble, and then proceeded to the nearest town to report to the customs officer, he had done everything in his power to comply with Canadian law, and that a deposit made in order to procure the release of the plane, which had been seized by the Canadian Customs authorities for the reason that the plane had not landed at an airport and had not immediately reported to the customs, should be refunded.

Executive Orders 5211 of Oct. 19, 1929, 5281 of Feb. 17, 1930, 7138 of Aug. 12, 1935, 7985 of Oct. 8, 1938, 8378 of Mar. 18, 1940, 8597 of Nov. 18, 1940, 8680-8684 of Feb. 14, 1941, 8718 of Mar. 22, 1941, 8729 of Apr. 2, 1941, and 8749 of May 2, 1941, specify the air-space reservations in the United States over which civil aircraft may not be navigated. 14 C.F.R. 60, App. A; 3 F.R. 2435; 5 F.R. 1114, 4559; 6 F.R. 1014-1016, 1621-1622; 6 F.R. 1791-1792; and 6 F.R. 2252-2253.

By Executive Order 8251 of September 12, 1939, regulating the entrance of foreign and domestic aircraft into the Canal Zone and navigation therein, the Canal Zone is set aside as a military air-space reservation in which it is unlawful to navigate any foreign or domestic aircraft otherwise than in conformity with the order.

Panama
Canal Zone

4 F.R. 3899; and see Ex. Or. 8271, Oct. 16, 1939 (4 F.R. 4277).

While the United States remained a neutral in the World War of 1914-18, the flight of aircraft over the Panama Canal Zone was governed by a proclamation of the President of the United States concerning the neutrality of the Panama Canal Zone. In rule 15 it was declared that aircraft of a belligerent power were forbidden to descend or arise within the jurisdiction of the United States at the Panama Canal Zone or to pass through the air-space above the lands and waters within that jurisdiction. Proclamation of Nov. 13, 1914 (38 Stat. 2039, 2041). Following the entry of the United States into the war President Wilson issued a proclamation, on May 23, 1917, containing rules for the maintenance of the neutrality of the Canal Zone. This proclamation contained a provision similar to rule 15 (40 Stat. 1667, 1668). On Feb. 28, 1918 a proclamation setting forth aircraft regulations for the United States provided that aircraft to be operated over or near any zone of "war-like operations or war-like preparation" must have a license from the Joint Army and Navy Board on

Aeronautic Cognizance. The whole of the United States and its territorial waters, its insular possessions, and the Panama Canal Zone were declared to be a zone of military operations and preparation. 40 Stat. 1753-1754.

In February 1939 the Superior Court of Panama reversed a decision of the Sixth Circuit Court of Panama declining jurisdiction in a case arising out of the crash of a Panamanian commercial airplane on the Paitillo Point Military Reservation. The judge of the Sixth Circuit Court had based his decision on the theory that the courts of Panama lacked jurisdiction to handle the case because the accident took place within the jurisdictional limits of the Canal's military zone, in which, by virtue of the agreement between the Governments of the United States and Panama, jurisdiction was exercised by the Government of the United States. The Superior Court said that the fall of the aircraft was the immediate consequence of happenings which took place either on the National Air Port or in the air; that the accident, or the causes which brought it about, did not take place on the lands and waters of the Panama Canal Zone over which the Government of the United States exercises jurisdiction, but in the air; and that, "inasmuch as the Republic exercises its sovereign jurisdictional rights there", the case came within the jurisdiction of the Panamanian courts.

The Department of State instructed the Ambassador in Panama to bring to the attention of the Foreign Office the fact that the Government of the United States had consistently exercised jurisdiction over the air-space above the Canal Zone in accordance with the well-established principle of international law that the "jurisdiction which a government exercises over any area under its authority and control extends to the airspace above such area".

Resolution of the Supreme Court of Panama, First Judicial District, Feb. 22, 1939, enclosure in despatch 101, Sept. 13, 1939, MS. Department of State, file 811F.7961/84½; 37 *Registro Judicial* (Panamá, 1939) 304; the Counselor of the Department of State (Moore) to the Ambassador in Panama (Dawson), no. 162, Feb. 21, 1940, MS. Department of State, file 811F.7961/84.

During revolutionary activities in Honduras in 1931, the Minister in Tegucigalpa notified the Department of State that the President of Honduras desired, for the transporting and dropping of bombs, the use of planes and pilots of an American commercial company operating in Honduras, but that the American company would not accede to the request. Later he informed the Department that an order for the company to place all sea, land, and air vehicles at the disposal of the Honduran Government had been withdrawn; that the Honduran Government had arranged to use these vehicles only when essential for immediate military needs and to pay for their use; and that the company was carrying officers in their planes as

Military
use of
commercial
planes

passengers. In response to a telegram saying that the company was allowing the use of a plane for reconnoitering in an attempt to locate rebel forces, the Department said:

The Department . . . views with much apprehension the participation in military operations of an airplane employed in purely commercial pursuits by an American corporation in Honduras.

The company reported that its planes had been used only over regulation passenger routes and had carried some military and civil government employees as regular passengers but that they had not been used for reconnoitering.

The Minister in Tegucigalpa (Lay) to the Secretary of State (Stimson), telegrams 60, 69, and 75, Apr. 18, 23, and 27, 1931, MS. Department of State, file 815.00 Revolutions/5, /22, /34; Mr. Stimson to Mr. Lay, telegram 30, Apr. 27, 1931, *ibid.* /40; Mr. Turnbull to the Boston Office of the United Fruit Co., telegram of May 7, 1931, *ibid.* /71:

CHAPTER XIV

INTERCOURSE OF STATES

DIPLOMATIC MISSIONS

AMBASSADORS AND MINISTERS

§370

The intercourse of states is, for the most part, conducted through the duly accredited representatives of the respective states, the principal classes of which are ambassadors extraordinary and plenipotentiary, envoys extraordinary and ministers plenipotentiary, ministers resident, and *chargés d'affaires*.

Every independent and full sovereign member of the family of nations possesses the right of legation, which is the right of a State to send and receive diplomatic envoys. This right has been accorded at times in a restricted form to Part-Sovereign and Semi-Sovereign States, the exact restrictions upon the diplomatic activity of each being determined by the instrument defining their international position. Right of legation

Memorandum of the Department of State, Apr. 6, 1920 (enclosure to letter from Under Secretary Polk to the Attorney General, Apr. 8, 1920), MS. Department of State, file 701.6111/648.

On the general subject of diplomatic officers, see: Feller and Hudson, *Collection of the Diplomatic and Consular Laws and Regulations of Various Countries* (1933), 2 vols.; the Harvard draft convention on "Diplomatic Privileges and Immunities", 26 A.J.I.L. Supp. (1932) 19; Ogdon, *Juridical Bases of Diplomatic Immunity* (1936); Satow, *Guide to Diplomatic Practice* (8d ed., London, 1932).

A convention on diplomatic officers was adopted at Habana in 1928. Sixth International Conference of American States, 1928: *Final Act* (Habana, 1928) 142; 22 A.J.I.L. Supp. (1928) 142. The United States is not a party.

The American Minister to the Union of South Africa requested that the Department furnish him with any definitions of "diplomatic agent" contained in American law in connection with discussions which he was having with the South African Department of External Affairs in regard to a law to "Define and Provide for the Immunities of the Diplomatic Agents and Consular Officers of Other States in the Union". The Department replied that under the laws of the United States and standing instructions of the Department the following persons were deemed to come within the definition of "diplomatic officers": "Ambassadors, Envoys Extraordinary, Ministers Plenipo- "Diplomatic officer"; definition

tentiary, Ministers Resident, Commissioners, *Chargés d'Affaires*, Counselors, Agents, and Secretaries of Embassies and Legations". It added:

You should point out, however, that while *Attachés* are not included in the foregoing definition they enjoy diplomatic immunities in this country including free entry privileges and for all intents and purposes they are assimilated to other diplomatic officers.

Under Secretary Castle to Minister Totten, no. 45, Apr. 21, 1931, MS. Department of State, file 701/171. The Department referred to section 1674 of the Revised Statutes, as amended by the acts of Feb. 5, 1915 (38 Stat. 806) and July 1, 1916 (39 Stat. 252); also to 22 U. S. C. §40.

See also For. Ser. Reg. U.S. II-2, Jan. 1941; Ex. Or. 8210, July 17, 1939.

Ambassadors

... an ambassador is the highest rank of diplomatic agent and is considered to be the personal representative of his sovereign or of the head of his state, while a minister is the representative of his state.

The Chief of the Division of Foreign Service Administration (Hengstler) to Miss Laura W. Steele, May 11, 1932, MS. Department of State, file 701/198.

At the present time, the chief difference between an ambassador and a minister is one of rank and precedence. In consequence of his being the personal representative of his sovereign or, in the case of a republic, of the whole people of his country, an ambassador is accorded special distinction.

The right of access to the head of the State to which he is accredited gives to an ambassador an opportunity to exercise his diplomatic functions with a facility not possessed by an officer of lower rank. This privilege, however, may be said to have lost at least something of its importance with the growth of the constitutional form of government.

The Acting Chief of the Division of Protocol and Conferences (Cooke) to Fletcher Cooper, June 11, 1935, MS. Department of State, file 121.41/57.

Mr. Guerrero, *rapporteur* of the subcommittee on the revision of the classification of diplomatic agents of the League of Nations Committee of Experts for the Progressive Codification of International Law, in his report to that Committee, said:

"The real meaning of the scale drawn up by the plenipotentiaries in 1815 is summarised in Article 2 of the Vienna Regulation: 'Only ambassadors, legates or nuncios shall possess the representative character'.

"What was then meant by the representative character? The right to represent the person of a sovereign and to have personal audience of the sovereign to whom the diplomat was accredited.

"This definition, which, according to Pinheiro-Ferreira, defined nothing, was absolutely false, even at the time of its introduction, because, first, ambassadors did not represent the personal interests of their sovereign, and, secondly, it was only when they were accredited to one of the few absolute monarchies that ambassadors could transact business without the intervention of the Minister of State.

"In the present state of international law, the sovereign is no longer a crowned head placed at the apex of supreme power. The nation alone is sovereign, and only the nation's interests are entrusted to diplomatic agents. The latter, therefore, whether they are nationals of a great Power or a small State, a monarchy or a republic, or whether they be called ambassadors or ministers, all derive their mission from the same source. The interests which they have in their keeping are identical; the aim which they pursue is the same.

"The credentials by which ambassadors and ministers plenipotentiary are accredited are absolutely identical, as are their rights and duties, the privileges and immunities granted them and the methods of communication with their own Governments and those to which they are accredited.

"Therefore there is no longer any reason to place ambassadors in a higher category than ministers."

League of Nations pub. A.15.1928.V [1928.V.4], p. 46.

"The rank of a diplomatic agent carries with it certain distinctive marks of dignity and honor, particularly of consequence in matters of ceremonial and precedence. In the case of an Ambassador it is held to mean something more. He is considered to be, in a peculiar degree, the personal representative of his sovereign or of the head of his state. He is deemed to possess a right of access, whenever he chooses to demand it, to the head of the state to which he is accredited. In the case of states to which Ambassadors are not accredited, officers of the highest diplomatic grade, such as Ministers, are frequently granted such access when requested as a requisite for the proper exercise of their diplomatic functions. It may be added that there appears to be no disposition to withhold on suitable occasions access to the head of the state from Ministers even in a state to which Ambassadors are accredited." The Third Assistant Secretary of State (Wright) to K. M. Dunbar, Jan. 21, 1924, MS. Department of State, file 124/orig.

Ambassadors, or ambassadors extraordinary and plenipotentiary, are accredited to sovereigns, and constitute diplomatic representatives of the first class.

The Chief of the Division of Foreign Service Administration (Davis) to Miss Lillie T. Bitting, Aug. 22, 1939, MS. Department of State, file 121.41/102.

... this Government does not accredit an ambassador and a minister to the same country in the capacities indicated. There have been cases, however, in which an ambassador on special mission has been appointed by the President to represent him at a *particular function* held in a foreign country to which an American minister was accredited.

It is not the custom of this Government to recognize an ambassador and a minister from the same country, except on special mission as indicated above. However, when an officer having the rank of minister in the diplomatic service of a foreign state is attached to an embassy at this capital, as is occasionally the case, he is recognized in the capacity of counselor of embassy.

The Chief of the Division of Foreign Service Administration (Hengstler) to Miss Laura W. Steele, May 11, 1932, MS. Department of State, file 701/198.

Dual
office

In January 1918 the Earl of Reading was accredited to the President of the United States as British Ambassador Extraordinary and Plenipotentiary on Special Mission and was also nominated High Commissioner in the territory of the United States. He was therefore carried on the Diplomatic List of the Department of State in both capacities.

MS. Department of State, file 701.4111/226.

In July 1918 the Argentine Ambassador, in informing the Secretary of State that he had returned to Washington and resumed charge of the Embassy, stated that he had been vested by the Government of Argentina with the powers and duties of High Financial Commissioner to the United States. He was carried on the Diplomatic List in this capacity as well as in the capacity of Ambassador.

Ambassador Naón to Secretary Lansing, July 10, 1918, MS. Department of State, file 701.3511/150.

Ministers

. . . Ministers, or envoys extraordinary and ministers plenipotentiary, are accredited to sovereigns, and constitute diplomatic representatives of the second class.

The Chief of the Division of Foreign Service Administration (Davis) to Miss Lillie T. Bitting, Aug. 22, 1939, MS. Department of State, file 121.41/102.

Ministers
resident

. . . Ministers resident are diplomatic representatives of the intermediate class, and are accredited to sovereigns. The diplomatic representative of the United States in Iraq is known as Minister Resident and Consul General, the consular office being superadded.

The Chief of the Division of Foreign Service Administration (Davis) to Miss Lillie T. Bitting, Aug. 22, 1939, MS. Department of State, file 121.41/102.

During the years 1904-10 the United States accredited a "Minister Resident and Consul General" to the Dominican Republic, and during the years 1866-1930 a representative with the same title was accredited to Liberia. The rank of the representatives of the United States in the two countries is now that of Envoy Extraordinary and Minister Plenipotentiary.

In Dec. 1936 the Government of Nicaragua accredited a Minister Resident near the Government of the United States. MS. Department of State, file 701.1711/311.

The Secretary of State of San Marino informed the Department of State, on February 2, 1924, that one Ignazio Pollak had been appointed Envoy Extraordinary to the States of North America and that he would present himself to the Secretary of State to deliver the greetings of the Government and the people of San Marino. He was received by the Secretary on April 17, 1924. The Department expressed the opinion that he was entitled to the immunities generally accorded under international practice to diplomatic officers.

The Third Assistant Secretary of State (Wright) to Nathan M. Goodman, May 8, 1924, MS. Department of State, file 701.60a11/2.

In a memorandum of December 5, 1925 addressed to the Under Secretary of State, the Solicitor for the Department of State expressed the opinion that the designation of envoy extraordinary and minister plenipotentiary "was intended to apply under international practice to persons accredited by the head of one State to that of another, as the former's representative at the seat of Government in the latter country". He also said:

... The limited practice which it appears has developed of conferring upon diplomatic officers in lower grades than that of Minister, the rank of Minister, without making them Ministers in fact, may therefore be regarded as a departure from the well settled and generally recognized meaning of the term.

MS. Department of State, file 121.51/3. See the decision of the Department in 1927 not to accord the personal rank of minister to counselors of embassy, discussed *post* §381.

In August 1931 the Department of State decided that in the future it would carry on its Diplomatic List as "envoy extraordinary and minister plenipotentiary" only those persons who presented letters of credence in that capacity and that those persons with the personal rank of "minister" in their own services who had not presented letters of credence should be carried as "minister plenipotentiary" as an act of courtesy.

Memorandum of the Division of International Conferences and Protocol, Aug. 6, 1931, MS. Department of State, file 701.4111/752.

On Aug. 4, 1924 the British Ambassador transmitted to the Department of State a sealed letter by which, he said, the Counselor of the British Embassy at Washington, Mr. Chilton, was accredited in the capacity of Envoy Extraordinary and Minister Plenipotentiary to the United States. The Department replied:

"... it would seem to appear that the letter is not one accrediting Mr. Chilton as Envoy Extraordinary and Minister Plenipotentiary to the United States, which would require the presentation of the letter by Mr. Chilton, and the President's reception of him in formal audience, but is rather in the nature of a courteous notification by His Majesty to the President that Mr. Chilton has been given the rank of Envoy Extraordinary and Minister Plenipotentiary in the British diplomatic service."

Mr. Chilton did not present the letter in person and was not received in formal audience by the President. He was given his personal rank by the Department of State as an act of courtesy and addressed in official correspondence as "Envoy Extraordinary and Minister Plenipotentiary, Chargé d'Affaires ad Interim of Great Britain". He was not, however, accorded precedence over chargés d'affaires when he was not in charge, or over British Dominion or other ministers when in charge. Secretary Hughes to Sir Esme Howard, Aug. 22, 1924, MS. Department of State, file 701.4111/500; memorandum of the Division of Western European Affairs, Aug. 5, 1931, *ibid.* /752.

On March 28, 1938 the German Ambassador requested that the section "Austria" be deleted from the Diplomatic List published by the Department of State and asked that the name of Mr. Prochnik, former Austrian Minister to the United States, be included in the list of the members of the staff of the German Embassy as "Minister Plenipotentiary". The Department replied that it was contrary to the practice of the Government of the United States to list a member of a foreign Embassy as "Minister Plenipotentiary" without the designation of his functional rank in that service and that, except for those individual ministers who were accredited to the Government of the United States directly and specifically in the capacity of "Envoy Extraordinary and Minister Plenipotentiary", the rank of "Minister Plenipotentiary" was considered to be a personal one and had no relation to the functions of a member of the staff of a diplomatic mission. It was explained that Mr. Prochnik's name might be listed on the Diplomatic List as "Minister Plenipotentiary" in conjunction with the designation of his functional grade in the Embassy. The German Ambassador replied, agreeing that Mr. Prochnik should be listed as "Minister Plenipotentiary, Attaché".

The Secretary of State to the German Ambassador, Apr. 2, 1938, MS. Department of State, file 701.6211/1025; the German Ambassador to the Secretary of State, Apr. 6, 1938, *ibid.* 701.6211/1026.

At the present time there are in the Embassies of Argentina, Great Britain, Mexico, and the Netherlands in Washington, officials with the rank of minister, carried in the Diplomatic List as envoys extraordinary and ministers plenipotentiary, but not formally accredited.

CHARGÉS D'AFFAIRES

§371

The term *chargé d'affaires* is used to denote the officer in charge of a diplomatic mission to which an ambassador or minister has not been appointed or from which an ambassador or minister has been withdrawn. A *chargé d'affaires*, as distinguished from an ambassador or minister, is usually accredited to the Secretary of State or Minister of Foreign Affairs and not to the head of the state.

Chargés d'affaires are diplomatic representatives of the third class, commissioned by the President and accredited by the Secretary of State to the minister for foreign affairs of the country to which they are sent.

The Chief of the Division of Foreign Service Administration (Davis) to Miss Lillie T. Bitting, Aug. 22, 1939, MS. Department of State, file 121.41/102.

The Department of State informed the American Consul General at Tangier in 1909 that a consular officer could be accredited in a diplomatic capacity as chargé d'affaires only by the Secretary of State in a communication to the Minister of Foreign Affairs. In this instance, the Minister at Tangier having accredited the Consul General as Chargé d'Affaires without instructions from the Department, the latter stated that the Minister had no statutory authority to take such action. However, to avoid embarrassment, the Department authorized the Consul General to notify the Moroccan Minister of Foreign Affairs that he had been duly accredited as Chargé and that his formal letter of credence would be presented as soon as received from the Department.

The Acting Secretary of State (Adee) to the Consul General (Robertson), Oct. 13, 1909, MS. Department of State, file 8350/32.

W. F. Dix, an American citizen, was given an exequatur as Honorary Consul General of Montenegro. Subsequently, the Attaché in charge of the Montenegrin Legation handed the Secretary of State a note saying that under instructions from his Government he was leaving the United States and was confiding the charge of the Legation to Mr. Dix. The Department informed Mr. Dix that his exequatur as Honorary Consul General had been revoked. Mr. Dix explained that a shipment of wine addressed to him as Chargé d'Affaires (Montenegrin Legation) and Consul General, was due to arrive in New York and asked that, since the shipment was started before the withdrawal of his letters, the Department accord him the courtesy of the port for the delivery of the goods to him. He was told that he was not entitled to the privilege of free entry.

The Acting Secretary of State (Davis) to W. F. Dix, Jan. 25, 1921, MS. Department of State, file 702.7311/35a.

In a memorandum prepared in the Office of the Solicitor for the Department of State the opinion was expressed that, for Mr. Dix to have become Chargé d'Affaires of Montenegro, it would have been necessary for him to have presented to the Secretary of State letters of credence from the Montenegrin Government designating him as Chargé d'Affaires and to have been received as such by the Secretary. MS. Department of State, file 702.7311/34.

Chargé
d'affaires
ad interim

... In the absence from the country to which he is accredited, or in the event of the death or disability of the chief of mission, the ranking Foreign Service officer assigned to the mission in a diplomatic capacity ... shall act *ex officio* as chargé d'affaires *ad interim* without credentials to that end unless specially instructed to the contrary by the Department of State. If there should be no Foreign Service officer at the mission, the Secretary of State may designate any competent person to act *ad interim*, who will be specifically accredited by letter to the Minister for Foreign Affairs.

For. Ser. Reg. U.S. II-2, n. 1, Jan. 1941.

Chargé des
affaires

The term *chargé des affaires* is sometimes used to describe a person who has been placed in custody of the archives and other property of a mission in a country with which formal diplomatic relations are not maintained; he has no claim to diplomatic immunity, and such relations as he may have with the authorities of the foreign government are purely of an informal character.

"... A 'Chargé des Affaires' ... has no representative character before the Government within whose territory he is and has no rights of intercourse or communication with that Government. He may, however, ... hand to the Minister for Foreign Affairs a communication addressed to him by the Minister for Foreign Affairs of his own country." The Chief of the Treaty Division of the Department of State (Barnes) to Representative Underwood, July 14, 1930, MS. Department of State, file 121.44/3. See also 1920 For. Rel., vol. I, p. 301, n. 47. But cf. I Oppenheim's *International Law* (5th ed., by Lauterpacht, 1937) 606.

COUNSELORS AND SECRETARIES

§372

Counselors and secretaries have been thus described by the Department of State:

... Counselors and secretaries are members of the body of permanent officers of the Foreign Service embracing all counselors of embassy or legation, diplomatic secretaries, consuls general, consuls, and vice consuls of career, and are known as Foreign Service officers.

The Chief of the Division of Foreign Service Administration (Davis) to Miss Lillie T. Bitting, Aug. 22, 1939, MS. Department of State, file 121.41/102.

In April 1925 Boylston A. Beal was accorded the honorary rank of Counselor of Embassy in the American Embassy in London. The Embassy was instructed to inform the British Foreign Office that he would rank immediately after the Counselor. In a memorandum by the Under Secretary of State, it was said that Mr. Beal acquired no new legal status and became in no sense a Foreign Service officer or a Counselor of Embassy within the meaning of the existing law and could perform none of the legal acts which the law empowered them to perform.

Secretary Kellogg to the American Embassy in London, telegram 181, Apr. 24, 1925, MS. Department of State, file 128B361/12a; memorandum of the Under Secretary of State (Grew), Apr. 24, 1925, *ibid.* /13.

ATTACHÉS

§373

An attaché of a legation in Washington carried on the Diplomatic List should receive the privileges and immunities accorded to members of diplomatic missions in the United States.

Secretary Lansing to James T. O'Neill, telegram of June 15, 1917, MS. Department of State, file 701.2311/85.

Chapter IX, sections 1 and 2, of the Foreign Service Regulations of the United States provides (Jan. 1941):

Attachés, other than those designated by the Secretary of State from the classified Foreign Service, shall be assigned by the Secretaries of their respective departments and, when such assignments have been approved by the Secretary of State, they shall be commissioned by him and shall reside at the seats of the various missions as the public interests demand. A diplomatic representative shall promptly inform the Foreign Office of the country to which he is accredited of the designation of an attaché to his mission.

The duties of attachés are such as may be prescribed for them by the heads of their respective departments, from whom they receive their instructions and to whom they shall report, but such duties shall be performed under the general supervision of the chief of mission.

In ceremonial matters, attachés are subject to the direction of the chief of mission, and are responsible to him for their personal conduct.

Ex. Or. 8352, Feb. 25, 1940.

Military
and naval
attachés

In a circular instruction of February 14, 1906 to certain diplomatic officers requesting them to report on the usage in regard to the presentation of military and naval attachés to the heads of the states to which they were accredited and to the several departments of the governments with which their duties required them to deal, the Secretary of State said:

It is understood that these attachés are usually presented by their Ambassador or Minister to the head of the State in person, and are in like manner presented to the Minister of War or of the Navy as the case may be, besides being furnished with all other possible facilities for meeting officially and knowing those high in authority in order to enable them to comply with the calls made upon them by their respective Departments for military and naval information.

This is the practice which obtains in Washington . . .

The peculiar and delicate functions of military and naval attachés, combining membership of the official diplomatic representation of their own government with the added privilege of direct intercourse with other than the diplomatic branches of the foreign administration and even of official association, on some occasions with the Head of the State and with the highest officers of its military establishment, make it desirable that American officers serving in those capacities shall enjoy no less privileges than their colleagues of other nationalities.

Secretary Root to the diplomatic officers of the United States at posts where a military or naval attaché is stationed, Feb. 14, 1906, MS. Department of State, 18 Instructions, Argentine Republic, 80-81.

. . . military attachés assigned to the foreign diplomatic missions at Washington transact their official business directly with the War Department. They act under the instructions of their own governments, and . . . it is understood that their duties are such as may be assigned to them from time to time by their government in respect of obtaining available military information.

The Assistant Secretary of State (Wright) to A. J. Stodolski, Apr. 15, 1926, MS. Department of State, file 701.0011/76.

In a note of September 16, 1907 to the American Ambassador in Berlin, the Germany Ministry of Foreign Affairs said:

Naval
attaché
accredited
to another
government

. . . Lieutenant-Commander Irving V. Gillis will always be received and made welcome by the Imperial officials in the territory of Kiautschou and will enjoy there every possible courtesy. But the recognition of Lieutenant-Commander Gillis as Naval Attaché for the territory of Kiautschou does not seem practicable under the principles of international law, because, as that officer is attached to the Legation of the United States of America in Peking, he is officially accredited to the Chinese and not to the German Government.

Ambassador Tower to Secretary Root, no. 1237, Sept. 18, 1907, MS. Department of State, file 1857/12.

Commercial attaches do not come within the principles of law applicable to consuls. They are classed as diplomatic officers and are entitled to the privileges and immunities appertaining to officials of that class. Commercial attaches

The Director of the Consular Service (Carr) to G. B. Roorbach, Nov. 28, 1921, MS. Department of State, file 702.09/23.

Provision was made in the Appropriation Act approved July 16, 1914 for commercial attachés—

to be appointed by the Secretary of Commerce . . . and to be accredited through the State Department, whose duties shall be to investigate and report upon such conditions in the manufacturing industries and trade of foreign countries as may be of interest to the United States. Act of 1914

38 Stat. 454, 500.

In June 1916 the American Ambassador in Petrograd (Lenin-grad) wrote to the Department of State that he was disposed to turn over to the commercial attaché recently appointed to his Embassy the commercial matters which another member of the Embassy had been handling. The Department replied that it did not believe that it was intended nor did it wish it to be thought that the duty imposed on a commercial attaché under the act of July 16, 1914 should interfere with the Embassy's duty to keep itself and the Department informed of trade conditions in Russia and to promote whenever proper the commercial relations between the two countries. The Department said:

The Department desires that the Commercial Attaché shall receive the benefit of any information of value that may come into the possession of the Embassy regarding "conditions in the manufacturing industries and trade of" Russia so that he may report upon them to the Secretary of Commerce, as is required of him by the act in virtue of which he was appointed, and it has no doubt the Embassy will be glad to give him its assistance to acquire information of this character; but it is to be understood that the Commercial Attaché has no diplomatic attribute and no authority, other than may be delegated to him by you, with the consent of the Russian Government, to make any representation to, or enter into any discussion or conference with, any official of the Russian Government regarding trade or other matters of any character arising in Russia.

Acting Secretary Polk to Ambassador Francis, no. 107, July 31, 1916, MS. Department of State, file 121.56/163.

An act of Congress approved March 3, 1927, establishing the Bureau of Foreign and Domestic Commerce in the Department of Commerce, provided in section 5:

Act of
1927

(a) Any officer of the foreign commerce service designated by the Secretary of Commerce shall, through the Department of State, be regularly and officially attached to the diplomatic mission of the United States in the country in which he is to be stationed. If any such officer is to be stationed in a country in which there is no diplomatic mission of the United States, appropriate recognition and standing, with full facilities for discharging his official duties, may be arranged by the Department of State. . . .

(b) No officer of the foreign commerce service shall be considered as having the character of a public minister.

44 Stat. 1394, 1396; 15 U.S.C. §197d.

In letters exchanged between the Departments of State and Commerce on April 9 and 16, 1927, agreement was reached as to the number of commercial attachés and assistant commercial attachés for whom diplomatic status would be requested in certain specified cities. The Secretary of State expressed the opinion, in which the Secretary of Commerce concurred, that in seeking diplomatic status for assistant commercial attachés the principle should be followed that such status should be sought only when the officer concerned took the place of the principal officer, during the latter's absence or disability, or when the assistant was engaged with the principal officer in performing virtually identic functions, and that such status should never be accorded an official who resided at a point other than the capital of a foreign state where a diplomatic mission was maintained, or to an officer who, though residing at such a capital, was chiefly engaged in traveling from place to place.

In a circular instruction of April 28, 1927 diplomatic officers were instructed to be guided by the plan outlined in the exchange of letters between the two Departments. They were authorized, in cases when the contemplated absence of a commercial attaché or assistant commercial attaché appeared to be of sufficient duration to warrant such action, to request, upon the designation of the ranking officer of the Department of Commerce serving at their posts, a temporary diplomatic status for the official so designated, who was to be described as "acting commercial attaché" or "acting assistant commercial attaché", as the case might be. Thus, it was said, there would not at any time be actively on duty with American missions a greater number of commercial attachés or assistant commercial attachés than was provided for in the above-mentioned letters.

The Under Secretary of State (Grew) to diplomatic officers, Apr. 28, 1927, diplomatic serial 594, enclosing a copy of a letter from the Secretary of State (Kellogg) to the Secretary of Commerce (Hoover), Apr. 9, 1927, and a copy of a letter from Mr. Hoover to Mr. Kellogg, Apr. 16, 1927, MS. Department of State, file 121.50/724.

The Department of State informed the Soviet Embassy, in 1933, that the Government of the United States had no objection to the appointment of a commercial attaché or commercial counselor to the Soviet Embassy in Washington who would perform the functions usually devolving upon a commercial attaché or counselor, i.e. "the collection of economic and commercial information, the study of market conditions, the promotion and facilitation of trade relations, and other analogous activities". The understanding was expressed, however, that such an officer should not engage in trade or commercial transactions of any kind and that he should not enter into business dealings or sign contracts with American firms, participate in buying or selling operations, etc.

Memorandum from the Department of State to the Soviet Embassy, Dec. 20, 1933, MS. Department of State, file 701.6111/744.

Pursuant to instructions from the Department of State, the Embassy in Paris made representations to the French Foreign Office to obtain exemption from personal taxation of American trade commissioners in France and the American customs representative. The French Foreign Office informed the Embassy on December 30, 1928 that the desired exemption would be granted and that the gentlemen concerned would be considered as being part of the personnel of the American diplomatic mission in France. The Department of State instructed the Ambassador as follows:

Trade com-
missioners

While for technical reasons it may have been necessary in order to exempt these gentlemen from personal taxation to consider them as being part of the personnel of your Embassy it is not believed that it will be advisable in any other way to consider them as being invested with a diplomatic character. In other words the Department does not deem it desirable that the persons in question should be considered as enjoying general diplomatic immunities other than the exemption from taxation.

Assistant Secretary Castle to Ambassador Herrick, no. 3065, Feb. 15, 1929, MS. Department of State, file 102.8102 Taxation/14 (France).

In 1922 the Department of State instructed the Minister to Czechoslovakia that the name of the American trade commissioner in that country should not appear on the diplomatic list as a member of the Legation and that free entry should be requested only for his official supplies sent to him by the Department of Commerce. Assistant Secretary Bliss to Minister Einstein, no. 50, June 14, 1922, MS. Department of State, file 701.0660f/-.

Agricultural
attachés

An act of Congress approved June 5, 1930 provided for a foreign agricultural service of the United States, the officers of which were to be known as "agricultural attachés, assistant agricultural attachés", or by such other titles as might be deemed appropriate by the Secretary of Agriculture. The act further provided:

... Any officer in said service, when designated by the Secretary of Agriculture, shall, through the Department of State, be regularly and officially attached to the diplomatic mission of the United States in the country in which he is to be stationed, or to the consulate of the United States, as the Secretary of Agriculture shall designate. If any such officer is to be stationed in a country where there is no diplomatic mission or consulate of the United States, appropriate recognition and standing, with full facilities for discharging his official duties, shall be arranged by the Department of State. The Secretary of State may reject the name of any such officer if, in his judgment, the attachment of such officer to the diplomatic mission or consulate at the post designated would be prejudicial to the public policy of the United States.

46 Stat. 497, 498; 7 U.S.C. §542(a).

The Department of State informed the Secretary of Agriculture, on Nov. 17, 1930, that it had been advised that the Yugoslav Government, the German Government, the British Government, and the Government of South Africa approved the appointment of agricultural attachés and assistant agricultural attachés and would be glad to extend to these officers the customary privileges enjoyed by members of diplomatic missions. The Under Secretary of State (Cotton) to the Secretary of Agriculture, Nov. 17, 1930, MS. Department of State, file 121.58/8.

Consolidation
of Foreign
Services

The Department of State informed diplomatic and consular officers on June 28, 1939 that, in accordance with a joint resolution (53 Stat. 813), the consolidation of the Foreign Services of the Departments of Commerce and of Agriculture into that of the Department of State would become effective July 1, 1939 and that the Departments of Commerce and Agriculture were certifying to the Department of State the lists of officers and American clerks who were transferred to the Department of State. It was explained that—

Subject to future determination it may be stated now that it is intended that the designation of commercial and agricultural attaché shall be retained. Similarly at certain posts officers may be designated, as circumstances require, as assistant commercial or assistant agricultural attaché. All other titles in the Foreign Commerce Service and in the Foreign Agricultural Service will, when the definitive organization is set up, disappear. It is intended that at certain posts a Foreign Service Officer of the consolidated Service of the Department of State shall be designated as commercial or agricultural attaché and at some posts as assistant commercial or assistant agricultural attaché. Until further and definitive instructions are received, the former officers of Commerce and of Agriculture who hold a title other than attaché

or assistant attaché will continue to use such designation. It is contemplated that those former officers of the Foreign Services of Commerce and of Agriculture who will not be designated as commercial or agricultural attaché, or as assistant commercial or assistant agricultural attaché, will be given the designation of consul or vice consul.

The Assistant Secretary of State (Messersmith) to diplomatic and consular officers, June 28, 1939, diplomatic serial 3084, MS. Department of State, file 120.1/413a; Reorganization Plan No. II, 53 Stat. 1431.

Chapter I, section 11, of the Foreign Service Regulations of the United States (Jan. 1941) provides for the designation by the Secretary of State of Foreign Service officers to serve as agricultural attachés and assistant agricultural attachés. Section 12 of the same chapter provides for similar designation of commercial attachés and assistant commercial attachés. Ex. Or. 8396, Apr. 18, 1940.

Prior to 1919 the Treasury Department maintained in the principal countries of Europe representatives known as "Special Commissioners". In 1919 they were designated "Treasury Attachés" and attached to the embassies or legations in the countries in which they were stationed. They acted under orders of the Secretary of the Treasury. On July 1, 1923 their title was changed to that of "Customs Attachés". Their title was again changed on October 1, 1923 to "Customs Representatives", and special passports were issued to them in lieu of their diplomatic passports.

Treasury
attachés

Memorandum from the Director of the Special Agency Service of the United States Customs (Van Doren) to the Under Secretary of the Treasury, Dec. 7, 1923, MS. Department of State, file 102.1702/105; the Under Secretary of State (Polk) to the Secretary of the Treasury, July 8, 1919, *ibid.* 102.102/277; the Assistant Secretary of the Treasury (Moss) to the Secretary of State (Hughes), July 6, 1923, *ibid.* /347; the Acting Secretary of State (Phillips) to the Embassy at Paris, *et al.*, telegram 354, Sept. 12, 1923, *ibid.* 102.1702/100.

An act of Congress approved January 13, 1925 provided *inter alia* that officials of the Treasury should be regularly and officially attached to American diplomatic missions abroad in the capacity of "Customs Attachés". 43 Stat. 748. Requests for recognition of such attachés were almost universally refused by the foreign governments concerned. The Department of State accordingly instructed diplomatic and consular officers that it was "obviously inadvisable for further efforts to be made by this Government to bring about recognition of a diplomatic status for 'Customs Attachés'". Instructions had been issued, it was said, to all such attachés to adopt the former title of "Customs Representatives" on letterheads, correspondence, and business cards. It was further stated that the status of "Customs Attachés" from the point of view of American law had not been changed and that, in those countries where they had been recognized as members of the diplomatic mission, they

would continue to be so regarded pending a modification of the act approved January 13, 1925.

The Acting Secretary of State (Grew) to certain diplomatic and consular officers, Dec. 24, 1925, MS. Department of State, file 121.57/14. For correspondence relating to the unsuccessful efforts to have customs attachés accorded diplomatic status, see 1925 For. Rel., vol. I, pp. 211 *et seq.*

An act of Congress approved June 17, 1930 provided that thereafter customs attachés should be known as "Treasury attachés".

46 Stat. 590, 762. In regard to these attachés (provided for in the acts of 1925 and 1930) the Department of State in 1935 said:

"... the Government of the French Republic was the only government with which arrangements could be made by this Government for the recognition of such attaché as a member of a diplomatic mission of the United States. Consequently, while such officers are known as treasury attachés in the Treasury Department, they are recognized abroad as "treasury representatives", with the exception referred to, and, although such representatives do not enjoy diplomatic immunity in the same degree as do attachés to diplomatic missions, they are recognized as officers of the Government of the United States and therefore enjoy certain privileges and immunities on the basis of reciprocity—such, for example, as immunity from the payment of income tax on their official compensation." The Assistant Secretary of State (Carr) to Louis E. Frechtling, Dec. 10, 1935, MS. Department of State, file 121.57/35.

Labor-recruiting agent

During the construction of the Panama Canal the Isthmian Canal Commission sent agents to Europe for the purpose of recruiting laborers. Through the Secretary of War, the Canal Commission requested the Department of State to designate one of the agents as an attaché of the Embassy in Paris. Mr. Le Roy Park was so designated but the French Foreign Office declined to accord him diplomatic status, giving the following reason:

You will perhaps kindly allow me to call to your attention the difficulties that the attribution of a diplomatic character to Mr. Le Roy Park could bring into existence and the immunities which would be incompatible with his functions of recruiter of laborers, the recruitment of laborers for foreign countries having been submitted to very rigorous regulations the least infraction of which exposes its authors to prosecution before the courts.

The Department withdrew the designation.

The Secretary of War (Taft) to the Secretary of State (Root), May 18, 1907; the Chargé d'Affaires at Paris (Vignaud) to Mr. Root, no. 68, Aug. 16, 1907, MS. Department of State, file 1107/7-9, /17.

Executive Order 5642, of June 8, 1931, defines language officers as follows:

Language officers

Language officers are Foreign Service officers appointed from the unclassified grade and assigned to certain countries for the

purpose of studying and perfecting themselves in prescribed foreign languages.

Chapter I, section 13, of the Foreign Service Regulations of the United States provides (Jan. 1941) :

"Foreign Service officers may be assigned by the Secretary of State as language officers to study the language or languages of, and to engage in other prescribed studies in relation to, a particular geographic area, subject to such rules and regulations as the Secretary of State may prescribe governing such studies. Foreign Service officers may likewise be designated as language secretaries to supervise the studies of language officers.

"(Ex. Or. 8396, Apr. 18, 1940.)"

COMMISSIONERS

§374

On November 30, 1918, prior to the resumption of diplomatic relations between the United States and Turkey, the Turkish Secretary of the American Embassy at Constantinople, Mr. Heck, was instructed to return to that city with the rank of Commissioner. The Department explained that it wished merely to have an official representative stationed at Constantinople (Istanbul) from whom it could receive information and that, since the Swedish Legation continued to handle the diplomatic affairs of the Government of the United States, it was not necessary for him to have official relations with the Turkish Government. He was instructed that, while he should do everything for American citizens compatible with his instructions, his chief mission was to keep the Department and the American Embassy at Paris fully informed of conditions in Turkey and that he should bear in mind that his mission was not identical with the Allied High Commissioners sent to Constantinople by the governments at war with Turkey.

Status

On May 3, 1919 Mr. Ravndal, American Consul at Constantinople without exequatur, was instructed to assume the title of Commissioner and to perform the duties theretofore performed by Mr. Heck. He was told to bear in mind that the rupture of diplomatic relations between the Governments of Turkey and the United States still continued; that he was not a diplomatic officer accredited to Turkey; and that he should avoid any act which might convey the idea that his presence, or that of other American officials in Turkey, meant a resumption of diplomatic relations.

In August 1919 the President appointed Rear Admiral Bristol High Commissioner at Constantinople, to be immediately under the direction of the Department of State in all matters political. The American Commissioner was instructed to report to him and to consider himself as under his general supervision and direction.

The Secretary of State (Lansing) to the Minister in Switzerland (Stovall), telegram 3435 (for Mr. Heck), Nov. 30, 1918, MS. Department of State, file 123H35/52a; Acting Secretary Polk to Commissioner Heck, telegram 2, Jan. 21, 1919, *ibid.* /60a; Mr. Polk to Commissioner Ravndal, telegram 90, May 3, 1919, *ibid.* 123R19/138; Mr. Lansing to the Commission to Negotiate Peace, telegram 2809, Aug. 12, 1919, *ibid.* 123B773/1b; 1919 For. Rel., vol. II, pp. 810-813.

On November 4, 1919, while the Spanish Ambassador was in charge of American interests in Germany, the Department of State instructed the Embassy in Madrid to inform the Spanish Foreign Office that E. L. Dresel would proceed to Berlin as American Commissioner. The Department desired, it said, merely to have an official representative in Berlin from whom it could receive information of interest and importance, and, since Mr. Dresel was not a diplomatic official accredited to Germany and would not have official relations with the German Government for the time being, the diplomatic affairs of the Government of the United States would continue to be handled by the Spanish Embassy.

Secretary Lansing to the Embassy in Madrid, telegram 2289, Nov. 4, 1919, MS. Department of State, file 124.62/71a.

Commissioners were also sent in 1919 to Austria, Hungary, Finland, and the Baltic Provinces of Russia.

For Mr. Dresel's instructions, see Mr. Lansing to the Commission to Negotiate Peace, telegram 3676, Nov. 5, 1919, *ibid.* 124.62/66; 1919 For. Rel., vol. II, p. 244.

Notarial acts

In an instruction to the Commissioner in Austria in 1921, the Department of State set forth the provisions of section 1750 of the Revised Statutes authorizing secretaries of Legation and consular officers to administer oaths, etc., and to perform notarial acts "at the post, port, place, or within the limits of his Legation, Consulate (or commercial agency)". The Department quoted from the act of Congress of April 5, 1906 requiring consular officers to administer oaths, etc., and to perform notarial acts "within the limits of his consulate" whenever application is made (34 Stat. 99, 101), and said:

. . . If there is no diplomatic mission or consular office of the United States in a particular country, it would seem to follow that American diplomatic or consular officers present therein, but not accredited, would be without authority to perform notarial acts. This Government has not resumed diplomatic relations with Austria, with which country the United States is still technically in a state of war. The office of the American Commissioner in Vienna, as at present established, is not an Embassy, Legation or Consulate within the meaning of the above quoted statutes. The American Commissioner has not been formally accredited to or received by the Austrian Government but is informally in Austria in the interest of the

Government of the United States. It would seem, therefore, that both he and those assigned to his office, whether members of the American diplomatic or consular service, are without federal legislative authority to perform notarial acts.

It is, of course, possible that certain *State* statutes may give authority to American diplomatic or consular officers generally to authenticate documents without limitation as to place, and a broad construction of such statutes would seem to include duly commissioned members of the American diplomatic or consular services attached or assigned to American Commissions in enemy countries. Such diplomatic and consular officers are, apparently, in the same position in these cases as are Spanish diplomatic or consular officers in charge of American interests in enemy countries, i. e., they have no authority under federal statutes to perform notarial acts but might derive such authority from the laws of a particular state.

The Second Assistant Secretary of State (Adee) to the Commissioner in Austria (Frazier), no. 281, Feb. 16, 1921, MS. Department of State, file 125.0064/1.

Similar instructions had been sent previously to the Commissioners in Hungary and Germany: Mr. Adee to Commissioner Grant-Smith, no. 307, Nov. 26, 1920, and Mr. Adee to Commissioner Dresel, no. 1248, Feb. 12, 1921, *ibid.*

On May 9, 1922 the Department of State instructed Maxwell Blake to proceed to the seat of the Albanian administration and to call upon the authorities and inform them that he had been sent to Albania in order to report to the Department and that his detail there did not imply recognition. He was told that his relations with the Albanian officials would be entirely informal and unofficial and that he should refrain from requesting formal recognition for himself or members of his staff. His headquarters, it was said, were to be known as the American Commission and his accounts were to be rendered as Consul General detailed as Commissioner.

Secretary Hughes to Consul General Blake, May 9, 1922, MS. Department of State, file 123B58/175.

The Czechoslovak National Council, through its President, informed the Department of State, on November 5, 1918, that it had appointed Charles Pergler its Commissioner in the United States and that it accredited him to the Government of the United States as the political and diplomatic representative of the Council with plenary power. The Department replied that it would be pleased so to accept him.

Secretary Lansing to President Masaryk, Nov. 14, 1918, MS. Department of State, file 701.60F11/2b.

SPECIAL ENVOYS

§375

In addition to diplomatic representatives appointed for general purposes, governments frequently designate envoys for particular purposes, such as the conduct of special negotiations and attendance at coronations, inaugurations, or other state ceremonies to which special importance is attached. In some instances the ranking diplomatic officer accredited to the country in which the ceremony is to take place is given a special designation for the occasion, and in other instances another person is designated. The designations, like the occasions giving rise to them, are always of a temporary character.

On the general subject, see Wriston, *Executive Agents in American Foreign Relations* (1929), and Preuss, "Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest", 25 A.J.I.L. (1931) 694

In 1917 President Wilson sent a special diplomatic mission to Russia composed, in part, of Elihu Root, Ambassador Extraordinary of the United States of America on Special Mission; John R. Mott, Charles R. Crane, Cyrus H. McCormick, Samuel R. Bertron, James Duncan, Charles Edward Russell, Envoys Extraordinary of the United States of America on Special Mission; Major General Hugh L. Scott, Chief of Staff, Military Representative of the President of the United States of America, on Special Diplomatic Mission, with rank of Minister; Rear Admiral James H. Glennon, Naval Representative of the President of the United States of America, on Special Mission, with rank of Minister.

Secretary Lansing to the Embassy at Petrograd, telegram 1407, May 16, 1917, MS. Department of State, file 763 72/4711a.

Norman H. Davis was appointed by the President, in March 1933, as Chairman of the Delegation of the United States to the General Disarmament Conference at Geneva, Switzerland, and was given the rank of Ambassador while serving in that capacity.

Secretary Hull to Norman H. Davis, Mar 14, 1933, MS. Department of State, file 500 A15A4 Personnel/957

Myron Taylor, the American representative on the special inter-governmental committee to facilitate the emigration from Austria and Germany of political refugees, was given the rank of Ambassador Extraordinary and Plenipotentiary.

Secretary Hull to the American representatives in certain countries, telegram of May 7, 1938, MS. Department of State, file 840.48 Refugees/219A.

In 1927 the Department of State listed the following instances of American officers sent abroad on special missions with diplomatic rank:

"Brig. General John H. Russell:

"Appointed by President Harding, High Commissioner with the rank of Ambassador Extraordinary, to represent the President in Haiti, February 11, 1922.

"Sumner Welles:

"Appointed by President Harding, Commissioner with the rank of Envoy Extraordinary and Minister Plenipotentiary, to represent the President of the United States in the Dominican Republic, July 1, 1922.

"Basil Miles:

"Appointed Special Representative of the United States with rank of Minister Plenipotentiary to assist the American Ambassador at Petrograd in representation of interests of foreign governments, January 10, 1917.

"Joseph C. Grew:

"Appointed by President Wilson, Secretary General of the Commission of the United States of America to Negotiate Peace, with the rank of Envoy Extraordinary and Minister Plenipotentiary, November 30, 1918."

Memorandum of the Under Secretary of State (Grew), Feb. 8, 1927, MS. Department of State, file 121.51/5.

Special envoys with diplomatic rank have been accredited in various ways. In some instances they have been the bearers of autographed letters of credence addressed to the heads of foreign states, as for example: John Hays Hammond, who attended the coronation of George V in 1911 as special representative of the President (MS. Department of State, file 814.001G29/-); the American Ambassador to Japan, who attended the enthronement ceremonies of the Japanese Emperor in 1928 as the special representative of the President with the rank of Ambassador Extraordinary and Plenipotentiary (*ibid.* 894.001H61/31a); Dr. W. E. B. DuBois, who attended the inauguration of the President of Liberia in 1924 as special representative of the President with the rank of Envoy Extraordinary and Minister Plenipotentiary (*ibid.* 882.001/19); H. M. Jacoby, who attended the coronation of the Ethiopian Emperor in 1930 as special representative of the President with the rank of Ambassador Extraordinary and Plenipotentiary (*ibid.* 884.001 Selassie I/147). In some instances it has been necessary to telegraph the letters of credence of special envoys, as in the following cases: the American Minister to Bolivia, who attended the inauguration ceremonies of the Bolivian President in 1917 as special representative of the President with the rank of Ambassador (*ibid.* 824.00/35); the American Minister to Yugoslavia, who attended the wedding of the King of Yugoslavia in 1922 as the special representative of the President with the rank of Ambassador (*ibid.* 860H.001AL2/14); the American Ambassador to Argentina, who attended the national centennial of Uruguay in 1930 as the special representative of the President with the rank of Amba-

Letters of
credence

Telegraphic
notice

sador Extraordinary and Plenipotentiary (*ibid.* 833.415/40); and the American Ambassador to Belgium, who attended the wedding of the Belgian Crown Prince in 1926 as special representative of the President with the rank of Ambassador Extraordinary (*ibid.* 855.0011/17). In some instances the Department of State has merely telegraphed to the Foreign Minister of the country to which the special envoy was accredited in regard to his designation, as was done in the case of the American Minister to Chile, who attended the second inaugural ceremonies of the President of Chile in 1929 as special representative of the President, with the rank of Ambassador (*ibid.* 823.001L52/36), and in the case of the American Ambassador to Spain, who attended the inaugural ceremonies of the Spanish President in 1936 as special representative of the President with the rank of Ambassador (*ibid.* 852.001/7).

Commission

In transmitting to Dr. Frank P. Corrigan in 1937 a commission issued by the President in which he was designated "Special Representative with the rank of Envoy Extraordinary and Minister Plenipotentiary to meet with representatives of the Governments of Venezuela and Costa Rica for the tender of good offices to the Governments of Honduras and Nicaragua with the object of facilitating a pacific solution of the controversy which has arisen between them over the definition of their common boundary", the Department of State explained that it was the usual practice for presidential commissions to be retained by the person to whom issued but that he was authorized to request the American Legation in San José to prepare an authenticated copy of the commission which he might in his discretion deposit with the Commission then meeting in San José for the exercise of good offices in the dispute.

Acting Secretary Welles to Minister Corrigan, Nov. 11, 1937, MS. Department of State, file 715.1715/930.

Special
envoys to
the U. S.

During the war, the Governments associated with the United States sent special missions to this country. Although their members were not regularly connected with the Diplomatic Services of their respective countries, this Department, in a desire to assist these missions in their work, included in the Diplomatic List the names of a number of persons on special mission. Although these persons have been gradually recalled by their Governments, this arrangement has given rise to a number of Diplomatic Missions including honorary officers in their personnel. This has become embarrassing, because of an increasing number of requests for honorary diplomats to be included on the Diplomatic List, and the Department has now been obliged, much to its regret, to request that no officers be carried on the List "ad honorem".

The Assistant Secretary of State (Bliss) to the Minister of Bolivia (Ballivian), Jan. 8, 1923, MS. Department of State, file 701.0011/51b.

AGENTS

§376

For a period of years prior to 1922 the United States was represented in Egypt by an "Agent and Consul General". It was also represented in Bulgaria by an "Agent" followed by a "Diplomatic Agent" during the years 1901-10. The rank of the representatives of the United States in these two countries is now that of Envoy Extraordinary and Minister Plenipotentiary. The title of the American representative in Morocco during the years 1917-25 was "Agent and Consul General".

An agent, in the practice of the United States, is a diplomatic representative accredited to the minister for foreign affairs of a dependent state. There is only one such officer now in the service, namely the "[Diplomatic] Agent and Consul General" to Morocco, the consular office being superadded.

The Chief of the Division of Foreign Service Administration (Davis) to Miss Lillie T. Bitting, Aug. 22, 1939, MS. Department of State, file 121.41/102. Regarding letters of credence for agents in Egypt, see *ibid.* 123Ar.63/1A and 128G.198/8a.

REPRESENTATIVES OF UNRECOGNIZED AND
FALLEN GOVERNMENTS

§377

In a memorandum of April 6, 1920, transmitted to the Attorney General, regarding the diplomatic status of Ludwig C. A. K. Martens, who purported to represent the Russian Socialist Federal Soviet Republic, the Department of State said:

Unrecognized
governments

It appears that although the right of legation is accorded full Sovereign States and may be, in a limited sense, accorded Semi-Sovereign States, . . . a deposed Sovereign or a community recognized as a belligerent can act only through political agents, who are not entitled to diplomatic privileges.

The Department cited I Oppenheim's *International Law* (2d ed., 1912), pp. 442, 443; I Pitt Cobbett, *Cases and Opinions on International Law* (3d ed., 1909) 300; and II Phillimore, *Commentaries on International Law* (3d ed., 1882), secs. 126 [*123*], 133, and concluded:

It would seem since it is within the jurisdiction of the political department of this Government to recognize or refuse to recognize the existence of a foreign State, which recognition, when it is accorded or refused, is binding upon the other co-ordinate branches of this Government and cannot be controverted by argument or collateral proof, that Mr. Martens is not an accredited official of a foreign Government and is not entitled by right to those diplomatic privileges recognized by International Law.

The Under Secretary of State (Polk) to the Attorney General, Apr. 8, 1920, MS. Department of State, file 701.6111/648.

During the pendency of proceedings looking to the deportation of Mr. Martens, in 1920, the Attorney General wrote to the Secretary of State that Mr. Martens claimed immunity on the basis of the closing proviso of section 3 of the Immigration Act of February 5, 1917, providing that nothing in the act should be construed "to apply to accredited officials of foreign governments". He requested the opinion of the Secretary as to the meaning of the words quoted and their applicability to the status of Mr. Martens. The Under Secretary of State replied that—

the term "accredited officials of foreign governments" was meant to refer to those officials of foreign governments who have come to the United States as representatives of their governments, as, for example, diplomatic officers.

Before there can be an accredited officer of a foreign government, however, it must be admitted that the government which the person purports to represent actually exists, and that the officer is in fact accredited by such existing government. The question of whether the so-called Russian Socialist Federal Soviet Republic should be considered by the United States as an existing government is entirely within the discretion of this Government. The underlying principles in such a case were enunciated by Chief Justice Marshall in the case of *Rose v. Hymely* (4 Cranch 239).

This Government has not recognized the Bolshevik regime at Moscow as an existing government, and has on more than one occasion publicly announced that Mr. Martens had not been received or recognized as "the representative of the Government of Russia or of any other government".

I am, therefore, of the opinion that the above quoted provision of the Immigration Act of February 5, 1917, has no application to the case of Mr. Martens. As of interest in this relation I may refer to the case of *Hollander v. Baiz*, *Consul General*, 41 Fed. 735, and to the opinion of the Supreme Court of the United States (135 U.S. page 403), sustaining the ruling of the District Court in the case just mentioned.

The Under Secretary of State (Davis) to the Attorney General, Nov. 30, 1920, MS. Department of State, file 701.6111/505.

On July 22, 1924 Señor Fausto Dávila, who called at the Department of State, said that he had been appointed representative in Washington of the provisional government of Honduras and that he would like to exhibit papers designating him as such at a later date. He was informed that it was impossible to receive him officially as formal recognition had not been extended to the provisional government of Honduras but that the Department would be glad to

receive him informally and discuss unofficially with him matters of interest to the Government of the United States and the provisional government of Honduras. He called again on July 25 and left papers which were found to consist of a note addressed by the Minister of Foreign Affairs of the provisional government to the Secretary of State, saying that Señor Dávila had been appointed Envoy Extraordinary and Minister Plenipotentiary of Honduras near the Government of the United States, and that an office copy of the autographed letter of the President accrediting him in this character to the President of the United States was enclosed. The papers were immediately returned to him with a statement that, as the United States had not formally recognized the provisional government of Honduras, it would not be possible to receive him as Envoy Extraordinary and Minister Plenipotentiary or to receive the note and copy of the letter of credence. It was again explained that the Department would at all times be glad to receive him informally.

The Acting Secretary of State (Grew) to the American Minister in Honduras (Morales), no. 645, July 30, 1924, MS. Department of State, file 701.1511/169a.

. . . From about December 26, 1920 to January 28, 1924, the Government of Greece was not recognized by the United States Government, but Greece had a diplomatic representative at this capital, with whom necessary business between the two governments was transacted informally.

The Under Secretary of State (Phillips) to Thomas D. Luce, Mar. 25, 1924, MS. Department of State, file 701.6811/159.

The Department of State, in February 1924, received a telegram from Dr. Ucles announcing his appointment as Secretary for Foreign Relations of a regime in Honduras not then recognized by the United States. The Department authorized the American Legation in Honduras to say to Dr. Ucles that, though the official reception of an agent of an unrecognized regime by the Secretary of State would not be possible, he would be willing to see him on the definite understanding that the interview would be purely informal.

Secretary Hughes to the American Legation at Tegucigalpa, telegram 26, Feb. 18, 1924, MS. Department of State, file 815.00/2893.

A penalty is provided in section 601, title 22, of the United States Code for anyone other than a diplomatic or consular officer or attaché who acts in the United States as an agent of a foreign government without prior notification to the Secretary of State.

On December 18, 1937 Juan F. de Cárdenas, referring to this provision, notified the Secretary of State that he was acting in the United

States as agent for Generalissimo Franco and his authorities. In acknowledging the letter it was stated that of course the acknowledgment did not give him an official status in the United States, since the Government of the United States had not recognized the regime of Generalissimo Franco.

Secretary Hull to Juan F. de Cárdenas, Dec. 27, 1937, MS. Department of State, file 701.5211/555.

The Consul at Seville, Spain, was instructed by the Department of State, during the course of the Spanish insurrection, with regard to a proposal that an exchange of agents be arranged with the Franco regime, that he should orally inform the appropriate authorities that the Government of the United States had taken no step which might be construed as recognition of that regime and that it was not the practice of the United States to exchange agents with a regime which had not been recognized.

Secretary Hull to the Consul at Seville, telegram 18, May 9, 1938, MS. Department of State, file 852.01/354.

Fallen
governments

When the duties of Mr. Bakhmeteff, the Ambassador of the Provisional Government of Russia in the United States, terminated on June 30, 1922, the custody of the property of the Russian Government in the United States, including the Russian Embassy building, was considered vested in Serge Ughet, the financial attaché of the Embassy. In notifying the Commissioners of the District of Columbia to this effect the Department said that Mr. Ughet's diplomatic status with the Government of the United States had not been altered by the termination of the Ambassador's duties and that he continued to enjoy the usual diplomatic privileges and immunities.

Assistant Secretary Wright to Commissioner Oyster, Jan. 8, 1924, MS. Department of State, file 701.6111/657.

In two actions brought by the Russian Government against the Lehigh Valley Railroad Company, the District Court of the United States for the Southern District of New York declared that the Ambassador of the "provisional Russian government" had the capacity to commence the cases before the court in 1918 even though that Government might then have fallen, since he was then and continued to be until June 30, 1922 "the accredited ambassador of that government [to this], which recognized the government he represented".

Russian Government v. Lehigh Valley R. Co., 293 Fed. 135, 136 (1923).

The Secretary of the Navy inquired of the Department of State, in January 1920, whether the Russian Embassy or the acting com-

mercial attaché thereof was competent to receive and receipt for money belonging to the Russian Government. The Department replied that, while recognizing Boris Bakhmeteff as the Russian Ambassador to the United States, it was not in a position to inform him as to Mr. Bakhmeteff's authority or as to the authority of the acting commercial attaché to do this. It was suggested that the Secretary of the Navy communicate with the Secretary of the Treasury. The former wrote again to the Department, in February 1920, that the Secretary of the Treasury stated that he did not object to payment's being made to the financial attaché of the Russian Embassy provided this met with the approval of the Department of State. The latter said that it did not object as long as it was clearly understood that it assumed no responsibility for the attaché's authority to receive and receipt for money belonging to the Russian Government.

The Second Assistant Secretary of State (Adee) to the Secretary of the Navy (Daniels), Jan. 28 and Mar. 9, 1920, MS. Department of State, file 701.6111/438, /445.

In August 1932 the Secretary of State of Minnesota wrote to the Department of State enclosing an order for hearing on petition for administration of the estate of a certain native of Russia, which he wished transmitted to the appropriate diplomatic representatives of Russia in the United States. The Department replied that it had not recognized the existing regime in Russia, that there were no diplomatic or consular officers or other representatives thereof in the United States, and that that regime was not represented in this country by officers of any other government. The Department stated that it continued to recognize Serge Ughet as Russian financial attaché, in which capacity he was appointed by the Provisional Government of Russia in 1917, but that, since Mr. Ughet did not represent the existing regime in Russia, it was doubtful whether that regime would give any effect or credence to any action which he might take with respect to the interest of heirs in Russia of persons dying in the United States.

The Assistant Secretary of State (Rogers) to the Secretary of State of Minnesota, Sept. 1, 1932, MS. Department of State, file 311.613 Michaelwicz, Stephen/2.

MEMBERS OF INTERNATIONAL BODIES

§378

As to courtesies, rights, and privileges of members of international commissions the Department of State in 1933 said:

With reference to your second inquiry concerning courtesies, rights and privileges granted to members of international com-

International
commissions

missions (such as the Danube Commission, the Elbe and Oder Commission, etc.), you are advised that the provisions of Sections 252-255 of Title 22, U.S. Code, . . . do not apply to persons assigned to special missions or commissions such as those mentioned by you. It is believed that the general principles of international law with respect to diplomatic immunity do not extend to persons with such status unless the members of such commissions are attached to the regular diplomatic mission in Washington of their respective countries and thereby they become entitled to diplomatic privileges in the regular way. They are, however, considered to be entitled to special protection and courtesies as distinguished citizens of their Governments.

The Under Secretary of State (Phillips) to the Turkish Ambassador (Muhtar), Oct. 16, 1933, MS. Department of State, file 701.09/374.

Article 37 of the multilateral convention instituting the definitive statute of the Danube, signed at Paris, July 23, 1921, provides that the property of the International Commission established thereunder "and the person of the Commissioners are entitled to the privileges and immunities which are accorded in peace and war to accredited diplomatic agents". 26 League of Nations Treaty Series (1924) 173, 193.

Article 8 of the multilateral convention instituting the statute of navigation of the Elbe, signed at Dresden Feb. 22, 1922, provides that the delegates to the International Commission of the Elbe, the Secretary General, and his assistant "will enjoy the usual diplomatic privileges". *Ibid.* 219, 225.

The Department of State informed the Secretary of the Treasury, on February 27, 1929, that General Ruprecht, the Uruguayan Delegate on the Commission of Investigation and Arbitration (Inquiry and Conciliation) in connection with the Paraguay-Bolivia boundary controversy, enjoyed a diplomatic status.

The Assistant Secretary of State (White) to the Secretary of the Treasury, Feb. 27, 1929, MS. Department of State, file 811.114 Diplomatic (83).

**Commissions
under peace
treaties**

Your third inquiry relates to courtesies, rights and privileges extended to members of bodies constituted as a result of the various peace treaties signed since 1918 (for instance, the Mixed Commission for the Exchange of Greek and Turkish Populations). You are advised that when such bodies are constituted pursuant to a treaty to which the United States is a party, the members thereof are granted exemption from the payment of customs duties on their effects accompanying them and are provided with special protection and courtesies on account of their official position. Diplomatic passports are issued by the United States to American citizens who are nominated or appointed by the United States to tribunals set up under international agreements to which the United States is a party.

The Under Secretary of State (Phillips) to the Turkish Ambassador (Muhtar), Oct. 16, 1933, MS. Department of State, file 701.09/374.

On May 6, 1920 the American Ambassador to France informed the Department of State that the French Government had consented to

grant certain diplomatic immunities to members of the Reparation Commission and that the negotiations leading up to this had been conducted on the theory that the different countries would grant reciprocal privileges to the personnel of the Commission in their respective countries. The Department instructed the Ambassador that the Government of the United States did not object in principle to granting reciprocal privileges but that diplomatic privileges and immunities were granted by statute to ministers of foreign states or princes received as such by the President and that the statute would hardly cover representatives of the Reparation Commission. Additional legislation to secure such privileges for them, it was said, would therefore be necessary and, while it was not possible to propose such legislation at that time, the matter would be favorably considered later.

Secretary Colby to the Embassy in Paris, telegram 921, May 10, 1920, MS. Department of State, file 701.0611/79.

In article 240 of the Treaty of Versailles the German Government agreed to accord to members of the Reparation Commission "and its authorized agents the same rights and immunities as are enjoyed in Germany by duly accredited diplomatic agents of friendly Powers". 3 Treaties, etc. (Redmond, 1923) 3331, 3422.

Article XLVI of the convention for the pacific settlement of international disputes signed at The Hague on October 18, 1907 provides:

Inter-
national
tribunals

The members of the Tribunal [The Permanent Court of Arbitration], in the exercise of their duties and out of their own country, enjoy diplomatic privileges and immunities.

2 Treaties, etc. (Malloy, 1910) 2220, 2236.

Article 19 of the Statute of the Permanent Court of International Justice provides:

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Per. Ct. Int. Jus., ser. D, no. 1, Statute and Rules of Court and Other Constitutional Documents, Rules or Regulations (3d ed., Mar. 1936), p. 16.

For the exchange of notes of May 22, 1928 between the President of the Permanent Court of International Justice and the Minister of Foreign Affairs of the Netherlands in regard to the diplomatic privileges and immunities of the judges of the court and officials of the registry at The Hague and the "General Principles" and "Regulations for Their Application" agreed upon, see *ibid.* 69.

The German Embassy, in 1925, asked that full diplomatic courtesies be extended by the Government of the United States to the German members of the Mixed Claims Commission of the United States and Germany. The Department of State informed the Treasury De-

partment that, while it did not consider that these gentlemen had full diplomatic status, it believed that they were entitled to receive special courtesies and privileges by reason of the nature of their mission and expressed the hope that they would be permitted to import articles of merchandise without payment of duty. The Treasury Department replied that it would be glad to authorize the free entry of articles imported by the German members of the Mixed Claims Commission during the period of their stay, in view of the statement that they were on a mission of a diplomatic character.

The Assistant Secretary of State (Wright) to the Secretary of the Treasury, May 7, 1925, MS. Department of State, file 462.11W892/474; the Acting Assistant Secretary of the Treasury (Birgfeld) to the Secretary of State (Kellogg), May 14, 1925, and Secretary Kellogg to the German Ambassador (Von Maltzan), May 22, 1925, *ibid.* /485.

Article 7 of the Covenant of the League of Nations provides that:

League of Nations

Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.

3 Treaties, etc. (Redmond, 1923) 3336, 3338.

In further reference to the status of the staff of the League of Nations and the International Labor Office, see the note in the *Annual Digest*, 1929-30, p. 314, and the *modus vivendi* of 1926 agreed upon by the Secretary General of the League of Nations, the Director of the International Labor Office, and the Swiss Federal Political Department, League of Nations, *Official Journal* (1926) 1422, and I Hudson, *International Legislation* (1931) 224.

For cases regarding the immunity from judicial process of representatives accredited to or sent by the League of Nations and officials of the League and the International Labor Office, see: V. ----- c. D. ----- (Court of First Instance of Geneva, 1926), 54 *Journal du droit international* (1927) 1175, *Annual Digest*, 1925-26, Case No. 247; O. M. c. A. O. (Court of Civil Justice of Geneva acting as supervisory authority for the Debt Collection and Bankruptcy Offices, 1929), *Annual Digest*, 1929-30, Case No. 204; W. K. c. *Office des Poursuites* (Court of Civil Justice of Geneva acting as supervisory authority for the Debt Collection and Bankruptcy Offices, 1929), *ibid.* 205; *Assurance Générale des Eaux et Accidents* c. F. B. (Court of Civil Justice of Geneva acting as supervisory authority for the Debt Collection and Bankruptcy Offices, 1929), *ibid.* 206; *Parlett* c. *Parlett* (Court of First Instance of Geneva, 1927), *ibid.* 207; *Confédération suisse* c. *Ivan de Justh* (Switzerland, Federal Assizes, 1st Dist., 1927), 40 *Revue pénale suisse* (1927) 179, 22 *Revue de droit international privé* (1927) 550.

In response to your first inquiry concerning rights, courtesies and privileges granted to agents of the League of Nations, I may state that under customary international law, diplomatic privileges and immunities are only conferred upon a well-defined class of persons, namely, those who are sent by one state to another on diplomatic missions. Officials of the League of Nations are

not as such considered by this Government to be entitled while in the United States to such privileges and immunities under generally accepted principles of international law, but only under special provisions of the Covenant of the League which have no force in countries not members of the League.

It is believed that the authorities of this Government would not be warranted under our law which is declaratory of international law, in according to agents of the League of Nations diplomatic immunities in the United States since such agents are not comprehended in the definition of diplomatic officers contained in our statutes. Section 40 of Title 22 of the Code of Laws of the United States reads as follows:

“‘Diplomatic Officer’ shall be deemed to include ambassadors, envoys extraordinary, ministers plenipotentiary, and ministers resident and none others.”

Your attention is invited to the fact that the immunity from suit provided in Section 252 [of title 22 of the United States Code] is granted to “any ambassador or public minister of any foreign prince or State, *authorized and received as such by the President*, or any domestic or domestic servant of any such minister”.

Customs courtesies and free entry privileges are granted to League officials en route through the United States and measures for their protection are afforded if requested.

The Under Secretary of State (Phillips) to the Turkish Ambassador (Muhtar), Oct. 16, 1933, MS. Department of State, file 701.09/374.

On the general subject of the status of officials of international organizations, see Basdevant, *Les fonctionnaires internationaux* (Paris, 1931).

In 1941 the Under Secretary of State wrote to the Assistant Director of the Pan American Union that it had been found impossible to accord him diplomatic status in the United States.

Pan
American
Union

The Under Secretary of State (Welles) to Dr. de Alba, Apr. 8, 1941, MS. Department of State, file 710.001/941.

UNION OF CONSULAR AND DIPLOMATIC FUNCTIONS

§379

The act of Congress approved May 24, 1924, as amended by the act approved February 23, 1931, provides:

... Foreign Service officers may be commissioned as diplomatic or consular officers or both: *Provided*, That all such appointments shall be made by and with the advice and consent of the Senate: *And provided further*, That all official acts of such officers while serving under diplomatic or consular commissions

Rogers
act, 1924, as
amended

in the Foreign Service shall be performed under their respective commissions as secretaries or as consular officers.

43 Stat. 140; 46 Stat. 1207, 1208; 22 U.S.C. §4. See *post*, ch. XV, §723.

For administrative purposes most officers of the Foreign Service of the United States hold commissions both as Secretaries in the Diplomatic Service and as Consuls General, Consuls, or Vice Consuls. This enables this Government administratively to assign them to any position in the Service without other commissions except post commissions in the case of consular officers and makes the body of permanent officers of the Service very flexible.

In certain capitals, where it has been found practicable, the Missions and the consular offices have been combined into single offices for the purpose of increasing their efficiency. In these cases, the officers below the rank of Chief of Mission assigned to the combined offices serve in a dual capacity, are commissioned in both capacities, and exequaturs or recognition are requested for them in their consular capacity. The diplomatic status of the officers is established in accordance with the usual practice by notifying the Government to which they are accredited. The offices function under the direction of the Chiefs of Mission and the officers perform such duties, either diplomatic or consular, as may be assigned to them by the Chiefs of Mission.

In the case of foreign representatives who serve in a similar dual capacity in Washington, this Government, upon being notified of their appointment, accepts them in their diplomatic capacity and issues exequaturs or recognition to them in their consular capacity. No objection is raised to their functioning in their dual capacity. Diplomatic status is accorded, however, only to such officers serving in a dual capacity who actually reside in Washington.

The Assistant Secretary of State (Carr) to the Egyptian Minister (Youssef), June 11, 1936, MS. Department of State, file 120.31/298.

Mr. Keith, who held an exequatur as American Consul at Bern, Switzerland, was temporarily appointed Second Secretary of Legation in that country in 1937. When notice of this was given to the Swiss Foreign Office it indicated its willingness to recognize him in the diplomatic capacity but indicated that in this event he would not be extended an exequatur for his consular functions. The Department of State, in an instruction to the Minister, expressed its understanding that under Swiss law Mr. Keith could continue to exercise his consular functions without an exequatur and stated that from the point of view of the Government of the United States an exequatur would not be necessary for the performance of notarial acts. The Minister subsequently notified the Foreign Office that it was intended to designate Mr. Keith permanently as Second Secretary of Legation and that it was desired that he continue to perform

consular functions. The Foreign Office replied that it would consider his exequatur as void but that it raised no objection to his continuing to exercise such functions.

Minister Wilson to Secretary Hull, no. 4844, Mar. 4, 1937, MS. Department of State, file 123K262/211; the Assistant Secretary of State (Carr) to Mr. Wilson, no. 3988, Apr. 16, 1937, *ibid.* /213; Mr. Wilson to Mr. Hull, no. 4977, May 27, 1937, *ibid.* /216.

The Peruvian Chargé d'Affaires ad interim having notified the Department of State in 1910 of the appointment of a Peruvian Consul General at New York as the commercial attaché of the Peruvian Legation, the Department observed that it would occasion inconvenience to have the important office of Consul General supplemented by an office of minor diplomatic designation. The incumbent of the office in such case, it was said, would possess a dual status, his diplomatic immunities outweighing those attached to his consular capacity, and the Department would therefore hesitate to advise the President to invest him by formal act of recognition with the diplomatic status and immunities pertaining under the law of nations to a public minister. Such immunities, it was stated, would attach, under the laws of the United States, to his position if he were admitted to membership in the Legation staff under the title of commercial attaché. The Chargé informed the Department subsequently that the Consul General's name had been withdrawn from the diplomatic list submitted to the Department.

Foreign
officers
in the U.S.

The Third Assistant Secretary of State (Hale) to the Peruvian Chargé d'Affaires (De Freyre y Santander), no. 83, Feb. 3, 1910, MS. Department of State, file 5883/20.

Requests have recently been received from various Missions for recognition as attachés of those Missions of consular officers already bearing exequaturs from this Government. After due consideration of the matter, the Department has come to the conclusion that it is inadvisable to accede to requests that foreign Consular officers, functioning as such in the United States elsewhere than in the capital, should regularly perform diplomatic duties as well. It has consequently felt constrained so to indicate to the Missions whose Governments have evinced a desire to appoint as Commercial Attachés Consular officers functioning as such in any city of the United States other than Washington, D. C.

Consular
officers as
attachés

Conversely, and quite obviously, having taken this position the Department would be unable to accede to a request that a diplomatic officer in this country to whom the consular office had been super-added, should perform consular functions outside the capital, and at the same time maintain his diplomatic status.

Diplomatic
officers as
consular
officers

The Under Secretary of State (Phillips) to the Honduran Minister (Córdova), Dec. 19, 1923, MS. Department of State, file 701.1511/157a. To the same effect, see Mr. Phillips to the Chilean Chargé d'Affaires ad interim (Gana-Serruys), Dec. 19, 1923, *ibid.* 701.2511/296a; Mr. Phillips to the Guatemalan Minister (Sanchez Latour), Dec. 19, 1923, *ibid.* 701.1411/137. See also memorandum of a conversation between the Assistant Secretary of State (Carr) and the Swiss Minister (Peter), Dec. 20, 1934, *ibid.* 702.5411/145 (refusal to recognize Consul General in New York as commercial attaché); the Assistant Secretary of State (Welles) to the Peruvian Ambassador (De Freyre y Santander), June 5, 1935, *ibid.* 702.2311/286 (refusal to recognize Consul General in New York as commercial counselor of Embassy); Secretary Hull to the American Legation in Costa Rica, telegram 21, May 29, 1936, *ibid.* 701.1811/209 (refusal to recognize the same person as Consul General in New York and as Secretary of Legation).

See also §389, *post*, on "Residence at Capital".

In acknowledging a note from the Cuban Embassy stating that a consul had been designated by the Cuban Government to render his services at the Cuban Embassy, the Department of State said that it understood that his name would be carried on the Department of State's "List of Employees in the Embassies and Legations in Washington not printed in the Diplomatic List". The Assistant Secretary of State (Welles) to the Cuban Ambassador (Fraga), Mar. 18, 1937, MS. Department of State, file 701.8711/819.

The British Ambassador informed the Secretary of State in 1937 that the commercial secretary of the British Embassy was about to depart on leave of absence and that his duties would be temporarily assumed by the British Consul at Baltimore. The Department stated that, in view of the temporary nature of the latter's assignment, a diplomatic identification card would not be issued to him and that his name would be carried on the Diplomatic List only during the absence of the commercial secretary. The Secretary of State to the British Ambassador, Dec. 4, 1937, MS. Department of State, file 701.4111/968.

In 1935 the Polish Chargé d'Affaires ad interim notified the Secretary of State of the appointment of Mr. Gruszka, Polish Consul General at New York, as commercial counselor of the Polish Embassy. The Secretary pointed out that it was contrary to the long-established policy of the Department of State "to recognize a foreign citizen as a duly-accredited diplomatic officer in Washington and at the same time as a consular officer in another city". The Secretary, therefore, before extending recognition to Mr. Gruszka in the capacity of commercial counselor, inquired whether it was intended to relieve him of his duties as Consul General and to request the termination of his recognition in that capacity. The Chargé replied that his Government did not intend to relieve Mr. Gruszka of his duties as Consul General but desired that, irrespective of the question of formal recognition other than in a consular capacity, he continue to conduct the commercial affairs of Poland in the United States. The Chargé expressed the hope that the American Government would extend to him in the performance of those duties such courtesies and facilities as were

possible under the circumstances. The Secretary answered that the officials of the Government of the United States would be pleased, under arrangements made by the Embassy either formally or informally, to afford Mr. Gruszka all appropriate courtesies and facilities in connection with the performance of such functions.

The Secretary of State to the Polish Chargé d'Affaires ad interim, Aug. 30 and Nov. 23, 1935, MS. Department of State, file 701.60C11/292, /299.

Upon certain occasions, however, as in an emergency, the Department has for a temporary period allowed persons to serve in a dual capacity. On other occasions, such as in the absence of a Minister, when there is no member of the Legation staff whom the Minister can designate as Chargé d'Affaires ad interim during his absence, the Consul General in another city has been temporarily placed in charge of the Mission.

Exceptions

The Assistant Secretary of State (Messersmith) to the Chargé d'Affaires ad interim in the Union of South Africa (Russell), no. 320, Sept. 28, 1937, MS. Department of State, file 701.0011/267.

The Argentine Embassy informed the Department of State, on Aug. 13, 1932, of the death of the Consul General of the Argentine Republic in the city of New York and said that the Counselor of the Embassy would be in charge of the Consulate General pending the appointment of a successor to the deceased. The Department stated that, while it seemed reasonable to permit a foreign diplomatic officer to be placed in charge of a consular office temporarily in the case of emergency, it was contrary to its practice to recognize a foreign representative in a diplomatic capacity in Washington and at the same time in a consular capacity in another city for an indefinite period. The Assistant Secretary of State (White) to the Argentine Ambassador (Espil), June 30, 1933, MS. Department of State, file 701.3511/461A.

After the recall in 1927 of the Estonian Envoy Extraordinary and Minister Plenipotentiary to the United States, the Department of State carried the name of the principal Estonian consular officer in the city of New York on the monthly Diplomatic List as Estonian Consul General or Acting Consul General in New York city "in charge of Legation". When the Estonian Legation was discontinued in Washington, the Estonian Consul General in New York notified the Department that his Government had as a matter of convenience placed him in charge of the Legation. The Department took cognizance of this action and, as a matter of courtesy, entered the name of the Consul General in that capacity in the Diplomatic List. It agreed to this arrangement as a purely temporary expedient on the assumption that it would be ended shortly thereafter by the reestablishment of an Estonian Legation in Washington. The Consul General, while permitted to address communications to the Department on diplomatic matters, was uniformly addressed by the latter with respect to such matters as "Consul General in charge of Legation". He was considered to have no immunities beyond those attaching to Estonian consular officers on duty in the United States and was invited as a courtesy to certain official diplomatic functions.

The Department of State instructed the Chargé d'Affaires ad interim in Tallinn on June 26, 1933 that, since the continuance of this arrangement

for nearly six years seemed to indicate that the Estonian Government did not intend to reestablish its Legation in Washington in the near future and in view of the expressed desire of certain other governments to make similar arrangements for their representation in the United States, to which the Government of the United States was not prepared to accede, he should bring to the attention of the Estonian Minister of Foreign Affairs the desire of the Government of the United States to regularize the existing anomalous situation with regard to the status of the Estonian Acting Consul General in the city of New York. He was instructed to say that, if there were no likelihood of a Legation's being soon reestablished in Washington, the Government of the United States, since it was not prepared to accord the status then enjoyed by the Estonian Acting Consul General to consular officers of other countries, would be constrained to remove the name of the principal Estonian consular officer in New York from the Diplomatic List, but that this would involve no change in his status except that his name would not be entered in the Diplomatic List and that he would not be addressed as "in charge of Legation". With regard to diplomatic matters, it was said, he would of course have as ready access to the appropriate officials of the Government of the United States as in the past, and this Government would be prepared to discuss with him any matters which he might desire to take up with it. The Department further instructed the Chargé that, since it did not wish to take any action which might impair the personal position of the then Estonian Acting Consul General in the city of New York, it was prepared to retain his name on the Diplomatic List for such time as he remained the principal Estonian consular officer there.

The Acting Secretary of State (Phillips) to the Chargé d'Affaires ad interim in Estonia (Carlson), no. 27, June 26, 1933, MS. Department of State, file 701.6011/36A.

A similar instruction was sent on June 26, 1933 to the Chargé d'Affaires ad interim in Latvia in regard to the Latvian Consul General in New York, who was being carried on the Diplomatic List as "in charge of Legation" and whom the Department of State had refused to receive as Chargé d'Affaires on the ground that it did not recognize diplomatic representatives residing outside of Washington. Mr. Phillips to Chargé Cole, no. 206, June 26, 1933, *ibid.* 701.60P11/34a.

The Ambassador to Belgium, who was accredited also as Minister to Luxembourg, informed the Department of State in May 1933 that Luxembourg wished to appoint an Honorary Consul General at New York, to be charged also with the custody of the Legation during the absence of the Chargé d'Affaires. The Department informed the Ambassador that its rules would not permit the acceptance of the suggestion of a dual position such as that proposed by the Luxembourg Government. The Ambassador was requested to inform the Luxembourg Government that, owing to the long absence of its Chargé d'Affaires from his post and the small likelihood of his returning to Washington in the near future, his name was being removed from the Diplomatic List. He was instructed to explain that this action would have no bearing on the relations between the two countries, since the United States would continue to maintain its diplomatic representation near the Luxembourg Government. The Acting Secretary of State (Phillips) to the American Embassy in Brussels, telegram 34, June 8, 1933, MS. Department of State, file 702.50A11/8.

In the course of his opinion in *Engelke v. Musmann*, Viscount Dune-din said:

. . . Mr. Engelke will enjoy diplomatic privilege not because he is styled Consular Secretary but because he, as an accredited member of the Ambassador's household, has privilege as such and does not forfeit it because he does some consular work.

In his opinion in the same case Lord Phillimore said that—

the positions of diplomat and consular employee are not mutually exclusive, and . . . indeed it has been in the past not uncommon to clothe a consul or consul-general with certain diplomatic functions and thereby to give him a diplomatic status.

[1928] A.C. 433, 447, 449.

DIPLOMATIC LIST

§380

The Department of State has said in regard to the publication of the Diplomatic List:

Names of members of foreign legations and foreign embassies in the United States entitled to diplomatic immunities, down to and including the grade of attaché, are published in the *Diplomatic List*. The names of other persons entitled to such immunities are contained in the List of Employees in the Embassies and Legations in Washington not Printed in the Diplomatic List.

The Under Secretary of State (Grew) to the German Chargé d'Affaires ad interim (Dieckhoff), July 16, 1926, MS. Department of State, file 701.05/126.

Although there does not appear to be any statutory provision specifically directing that this Department publish a list of diplomatic officers duly accredited to it [this Government] by foreign governments and accepted and recognized as such officers by this Government, the publication of such a list is a usual practice of nations in the conduct of foreign affairs. The diplomatic list of the United States has been published monthly since September 1893.

The Legal Adviser of the Department of State (Hackworth) to Samuel F. Frank, Dec. 15, 1931, MS. Department of State, file 026 Diplomatic List/4.

"I. The names of all duly accredited foreign diplomatic officers are included in the Department's Diplomatic List.

"It is customary for most foreign missions to submit monthly a list of those employees of embassies and legations not appearing in the Diplomatic List. This list, with a copy of the Diplomatic List, is transmitted to the Marshal of the District of Columbia and both groups are entitled to

the immunity prescribed in Sections 4063-4065 of the Revised Statutes of the United States.

"II. The general privileges accorded under international law to diplomatic representatives in the United States are not limited to those whose names are contained in the "Diplomatic List", but are extended generally to all persons who are officially recognized by the Department of State as attached to a diplomatic mission."

The Chief of the Division of Near Eastern Affairs (Murray) to the Greek Minister (Simopoulos), Mar. 20, 1931, MS. Department of State, file 701/170.

In 1937 the Dominican Legation requested the Department of State to issue identification cards to its subordinate employees. The Department replied:

Identification cards

In contrast to the laws of certain foreign countries, the possession of identification cards is not a statutory requirement in the United States. Accordingly, identification cards as such are non-existent in the United States and there is no express provision of law for the issuance of identification cards to persons residing in this country, whether they are nationals thereof or aliens residing therein, officially or otherwise.

In this connection it is pertinent to add that the Secretary of State, recognizing the occasional necessity for accredited diplomatic agents of foreign governments being in a position to identify themselves easily and readily, has provided for the issuance without charge, to accredited diplomatic officers in Washington, of cards which are generally referred to as diplomatic identification cards. This gratuitous action, however, is taken only as a courtesy to such accredited diplomatic officers and not as a legal requirement.

In the event the Minister is of the opinion that a document of identity would be of assistance to an employee of the Legation, a document over the signature of the Minister and the Legation seal stating the capacity in which the employee is serving the Legation would provide every need of identification with the authorities of the District of Columbia and would be honored by the police and other officers of the District.

The Secretary of State to the Dominican Minister, Aug. 31, 1937, MS. Department of State, file 701.3911/359.

"No provision has been made for the issuance of identification cards to persons whose names are not included on the *Diplomatic List*. This does not mean that such persons do not receive the privileges and immunities to which persons who are attached to the person of the Chief of Mission are legally entitled." The Secretary of State to the Yugoslav Minister, June 16, 1937, MS. Department of State, file 701.60H11/181.

Certificate of status

In reply to a request by an attorney for a certificate of the Secretary of State showing the diplomatic status of the commercial attaché to the Peruvian Embassy, the Department said that it was its practice

to furnish such certificates only upon the request of the diplomatic officer concerned or upon an order of a competent court.

The Third Assistant Secretary of State (Bliss) to Thomas J. Molloy, July 9, 1921, MS. Department of State, file 701.2311/163.

An application to release the *Rogday* was made on behalf of the Russian Government through its consular officer in San Francisco. It was accompanied by a certificate of the Secretary of State certifying that Mr. Bakhmeteff was the duly accredited diplomatic representative of Russia to the United States at Washington and a certificate from the latter that the person presenting the suggestion was entitled to recognition as the acting Russian Consul at San Francisco and authorized to represent the Russian Government in the matter before the court. The District Court of the United States said that the question raised by the libelants as to whether the officers making the demand duly represented the existing Russian Government presented no proper subject of inquiry for the court, "that being purely a political question, concluded here by the certificate of the Secretary of State".

The Rogday, 279 Fed. 130-131 (N.D. Calif., 1920).

The Department has observed that in a number of Foreign Diplomatic Lists are carried the names of certain officers connected with American Diplomatic Missions who are not Diplomatic Officers, nor Military, Naval or Commercial Attachés or Assistant Attachés. It is the Department's desire to have as nearly as may be possible uniformity in this respect. You are instructed therefore to include in the lists submitted by your respective Missions for publication in Foreign Office lists the following commissioned officers:

Foreign
diplomatic
lists

Heads of Missions; Diplomatic Officers of career; Consular Officers when attached to Diplomatic Missions with the rank of Secretary; Japanese and Chinese Secretaries, and Japanese and Chinese Assistant Secretaries; and Military, Naval and Commercial Attachés and Assistant Military, Naval and Commercial Attachés when notifications of the designation of such officers have been received through the Department of State.

It is observed by the Department in this connection that Trade Commissioners of the Department of Commerce are frequently appointed by that Department temporarily to serve as Acting Commercial Attachés. The name of such officer, when notification is received by a Mission through the Department of State of his designation to serve as "Acting Commercial Attaché", should be included in the list.

With respect to those Missions to which are attached Student Interpreters and Military and Naval Officers as Language Attachés, the names of such officers may also be included in the lists submitted to the Foreign Office for inclusion in the Diplomatic Lists.

In no case is the name of any officer, other than those set forth above, to be included in lists submitted by the Missions for pub-

lication in the Diplomatic Lists without first receiving permission from the Department of State.

The Assistant Secretary of State (Wright) to diplomatic officers, Jan. 24, 1924, diplomatic serial 240, MS. Department of State, file 121/a.

In the case of *Engelke v. Musmann* an action had been brought for arrears of rent against a German consular secretary in London who also performed duties in the German Embassy. Upon appeal from an order for cross-examination of the defendant the Attorney General intervened and stated :

The Attorney-General submits that it is a necessary part of His Majesty's prerogative in his conduct of foreign affairs and his relations with foreign States and their representatives to accord or to refuse recognition to any person as a member of a foreign ambassador's staff exercising diplomatic functions. For this purpose a list of the members of his diplomatic staff is furnished from time to time to the Secretary of State by every foreign ambassador. This list is not accepted as of course on behalf of His Majesty, and after investigation it not infrequently happens that recognition is withheld from a person whose name appears upon the furnished list, either because his diplomatic status is in doubt or because the number of persons for whom that status is claimed appears to the Secretary of State to be excessive. The list prepared by the Secretary of State and forwarded by him to the sheriffs for the purposes of the statute of Anne, while it is based upon the list furnished in the first instance by the ambassador, is not therefore necessarily identical with it. The sheriffs' list, however, is not itself conclusive evidence in a court of law on the question of diplomatic status, since it is plain that changes may have occurred in the personnel of the ambassador's staff since the list was prepared with the result that persons whose names appear in it may have ceased to be members of the staff and others whose diplomatic status is undoubted may not yet have been included in it.

He took the position that a statement that recognition had been accorded to any particular person as a member of the diplomatic staff of the foreign ambassador, made on behalf of His Majesty either by the Secretary of State or the Attorney General in person, was conclusive of the diplomatic status of that person.

The House of Lords held that the defendant was entitled to diplomatic privilege. Lord Buckmaster said :

Now the acceptance and recognition of persons who form the staff of an ambassador are matters which, having regard to the practice in the conduct of foreign affairs, are equally based on the comity of nations and necessarily also within the cognizance of the Crown acting through the Foreign Office. They are in a position to know what are the duties performed and the persons who perform them, and it is plain that, though they trust the

list put forward if it appears from their knowledge to be a list which might reasonably be accepted, yet the list itself is scrutinized, inquiries are made and, if necessary, persons are removed for sufficient reasons. . . . The list is not conclusive, nor is it the list itself on which reliance is to be placed, but on the statement of the Crown, speaking through the Attorney-General, stating that a particular person at the critical moment is qualified to be upon the list. When this statement has been made it is difficult to see how it can be questioned without the introduction of proceedings which in the person of the ambassador himself, and equally of his wife and family and staff, it would obviously be undesirable to institute.

Lord Phillimore said:

When therefore the certificate from the Foreign Office was delivered by the Attorney-General, it was not, as suggested on behalf of the plaintiff, a piece of hearsay evidence, a mere narrative of what the Ambassador had told the Foreign Office. It was a statement of what the Secretary of State on behalf of His Majesty had done, not what he was doing ad hoc, or what he was believing and repeating, but what the Foreign Office had done. The certificate is no attempt on the part of the executive to interfere with the judiciary of the country. The status which gives the privilege has been already created by the Crown in virtue of its prerogative in order to administer its relations with a foreign country in accordance with international law.

[1928] A.C. 433, 435, 443, 444, 451.

See also the French case of *Drillek c. Barbier* (Court of Appeal of Paris, 7th chamber, 1925), (53 *Journal du droit international* [1926] 638; *Annual Digest*, 1925-26, Case No. 242), summarized *post*, §402.

The Persian Legation inquired of the Department of State as to the status of its physician. The Department replied that in the past it had sanctioned the inclusion in the list of employees of foreign embassies and legations of the names of native physicians whose duty it was to minister solely to the medical needs of the chief and staff of the mission. While a subject or citizen of a foreign country might obtain a license to practice medicine in the District of Columbia, it was said, the Department would not permit the inclusion in the list of employees of a foreign mission of the name of a general practitioner or one engaged in practice outside of the embassy or legation. Physicians

The Chief of Protocol (Dunn) to the Persian Legation, Oct. 9, 1934, MS. Department of State, file 701.9111/427.

In response to an inquiry by the Department of Health of the city of New York as to the status of Dr. Shevket Namik, who, it appeared, described himself as medical attaché of the Trukish Embassy in Washington, though he was resident in New York, the Department of State said that he had arrived in the United States with the suite of the Turkish Ambassador to the United States, in the capacity of physician to the Embassy; that his

status was not that of a diplomatic officer but merely of a member of the official household of the Ambassador and that, while, as such, he was entitled to certain immunities, the continued enjoyment thereof was dependent upon residence near his Chief; and that the Turkish Embassy had been so advised. The Department also said that the Embassy had been notified that his professional services should be limited to members of the Embassy staff. The Department subsequently informed the Department of Health that Dr. Namik had been instructed by the Turkish Ambassador to proceed immediately to Washington, where he was to take up his permanent residence. The Under Secretary of State (Castle) to S. Dana Hubbard, May 4 and May 11, 1931, MS. Department of State, file 701.6711/271, /275.

The Department of State informed the President in 1918 that no such post as "physician to an embassy" existed in the American diplomatic service and that it was without authority to create one. It stated that there would be no objection to Dr. T. -----'s styling himself "Physician to the American Ambassador at Tokyo", although such designation could not be officially recognized. The Department subsequently instructed the Ambassador in Tokyo that he might authorize Dr. T. ----- to assume the honorary title of "Physician to the American Embassy at Tokyo". The Acting Secretary of State (Polk) to the Ambassador in Japan (Morris), Aug. 6, 1918, MS. Department of State, file 124.94/8.

Honorary diplomatic officers

It is contrary to the practice of the Department of State to include in the Diplomatic List foreign diplomatic officers having but an honorary status, although an exception was made in the case of Constantin Brun, Honorary Counselor of the Danish Legation, in recognition of his long years of service as Minister of Denmark in the United States.

The Assistant Secretary of State (Carr) to the Venezuelan Minister (Arcaya), Dec. 1, 1933, MS. Department of State, file 701.3111/205.

BEGINNING AND END OF MISSION

APPOINTMENTS

§381

Power of appointment

The act of Congress approved March 2, 1909 repealed the provision contained in the act approved March 1, 1893 that whenever the President should be advised that any foreign government was represented, or about to be represented, in the United States by an ambassador, envoy extraordinary, minister plenipotentiary, minister resident, special envoy, or chargé d'affaires, he was authorized, in his discretion, to direct that the representative of the United States to such government should bear the same designation, but that this provision should in no wise affect the duties, powers, or salary of such representative. 27 Stat. 496, 497; 35 Stat. 672.

The act of 1909, just referred to, further provided that "hereafter no new ambassadorship shall be created unless the same shall be provided for by Act of Congress". *Ibid.*

In 1909, subsequent to the recognition of Bulgaria as an independent kingdom, it was proposed to commission and accredit to Bulgaria as Envoy Extraordinary and Minister Plenipotentiary Mr. Eddy, who at that time occupied the post of Minister to Rumania and Serbia and Diplomatic Agent to Bulgaria. The question having arisen whether it was necessary, in order to accomplish this proposed change, to have Congress pass an act creating the new post, or whether, since no increase in salary was involved as a result of the proposed change, it could be made by official nomination by the President without previous action of Congress, the Solicitor for the Department of State, on June 14, 1909, expressed the following opinion:

New diplomatic posts

It seems entirely clear that it is not necessary that Congress should create the post of E. E. & M. P. to Bulgaria prior to the designation of Mr. Eddy to the mission. The Constitutional provision reads that "HE (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and with the advice and consent of the Senate, shall appoint Ambassadors, other public ministers and consuls".

After quoting from an opinion of Attorney General Cushing (7 Op. Att. Gen. 186), the opinion continued:

It would thus seem clear that it is not necessary that Congress should create the post E. E. & M. P. to Bulgaria, in order that it might come into existence. The President can create the post by appointing some one to fill it.* (*This would not seem to be affected by the provisions of Public Act No. 292, March 2, 1909, which, *if constitutional*, applies in terms only to Ambassadors.)

It would seem, however, that since Congress is in session, it would be necessary for the President to nominate Mr. Eddy and submit his nomination for confirmation to the Senate.

The final paragraph of article 2, section 2 of the Constitution provides, "The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session".

Inasmuch as this gives power to the President to fill by appointment any vacancy "that may happen *during the recess of the Senate*," and inasmuch as the Senate is now in session, an appointment would seem not to fall within the powers given to the President by the above quoted Constitutional provision. Therefore, if Mr. Eddy is now nominated for the position, this nomination should be sent to the Senate for confirmation.

However, since the post of E. E. & M. P. to Bulgaria does not at present exist, and since it would seem that such a post will not exist until the President takes some measures to create and fill it,

it would be possible for the President to postpone any action in the matter until after the adjournment of Congress. It would seem, further, that he could then nominate Mr. Eddy to the post, which act would create the post, and at the same time fill it. It would appear that such an act upon the part of the President would create a "vacancy" within the meaning of the Constitutional provision. Concerning this point, Mr. Cushing, in the opinion above referred to, said:

"And thoughtful men have held that wherever no 'ambassador' or 'public minister' exists at the moment, and the exigency for one springs up, there is a 'vacancy' in the true spirit of the Constitution" (p. 212)

It is believed, therefore, that Mr. Eddy may not be designated as E. E. & M. P. to Bulgaria during the present session of Congress, except by and with the consent of the Senate; but that if his designation be postponed until the Senate adjourns, then he may be so designated on the ground that by such an act the President will be filling a "vacancy" within the meaning of the Constitutional provision above quoted.

At the request of the Department the Diplomatic and Consular Appropriation Act for the year ending June 30, 1911 contained a provision for an Envoy Extraordinary and Minister Plenipotentiary to Rumania, Serbia, and Bulgaria.

The *Chargé d'Affaires* at Bucharest (Harvey) to the Secretary of State (Knox), no. 28, Nov. 15, 1909, and the opinion of the Solicitor for the Department of State, June 14, 1909, MS. Department of State, file 1128/5; Secretary Knox to the Honorable James Breck Perkins, Jan. 5, 1910, *ibid.* /8A; 36 Stat. 337.

According
personal
rank of
ambassador
or minister

The Secretary of State, on February 8, 1927, in consultation with the Under Secretary, the Assistant Secretary, and the Solicitor, decided that, owing to the provision in the Constitution for the appointment of ambassadors and other public ministers by and with the advice and consent of the Senate, it would be illegal to accredit a counselor of embassy as an envoy extraordinary and minister plenipotentiary without the advice and consent of the Senate and that to give such a counselor of embassy the personal rank of minister might be interpreted as an attempt to circumvent the law. The Secretary felt that the cases of certain officers sent abroad on special missions could not be taken as precedents, because under those circumstances the President could give such an officer any rank he chose.

Memorandum of the Under Secretary of State (Grew), Feb. 8, 1927, MS. Department of State, file 121.51/5.

Designation
of counselors

In response to an inquiry in 1927 whether the existing practice of designating Foreign Service officers as counselors of embassies or legations by instructions signed by the Secretary of State or in his

behalf by an executive officer of the Department conformed with the provisions of section 16 of the act of May 24, 1924, authorizing the President to designate and assign any Foreign Service officer as counselor of embassy or legation, or whether such designations should be made directly by the President, the Solicitor for the Department of State expressed the opinion that the existing practice was "unassailable from the point of view of law".

Memorandum of the Solicitor for the Department of State, Aug. 10, 1927, MS. Department of State, file 121.51/8; 43 Stat. 140, 143.

There is no definite rule for determining whether the diplomatic representative of one country at the capital of another country shall be given ambassadorial or ministerial rank. The determination of that question is necessarily a matter of policy involving consideration of a number of factors which may vary considerably in different countries and at different periods of time. Generally speaking, however, it may be said that the rank to be given the diplomatic representative accredited by one country to another is determined by mutual desires of the two governments concerned and is based largely on considerations of the political and economic relations existing between the two countries. Although the functions of the two types of diplomatic officers are similar, it is sometimes found desirable to have a diplomatic officer of the highest rank stationed at a particular foreign post.

Determina-
tion of rank

The Assistant Secretary of State (Carr) to Boyce Eakin, Jan. 25, 1937, MS. Department of State, file 121.41/70.

. . . it is customary when missions are raised to embassies for the two countries concerned to act simultaneously.

The Chief of the Division of Western European Affairs (Castle) to Miss Bobbie Smartt, Nov. 19, 1926, MS. Department of State, file 701.0011/80.

The Department of State instructed the Minister to China in 1935 to inform the Chinese Minister of Foreign Affairs orally that the raising to the status of Embassy of the American Legation in that country had been approved by the President and that, although it would be essential in order to complete the change for the Senate to confirm the President's nominee as Ambassador and for Congress to appropriate money for the salary of an Ambassador instead of a Minister, it expected shortly to announce the administration's intent in this regard. The Minister was also instructed to say that the Government of the United States would be pleased if the Chinese Government should raise to the status of an Embassy its Legation in the United States. Secretary Hull to the Consul at Nanking (for the Minister), telegram 36, May 15, 1935, MS. Department of State, file 124.93/289.

The Special Agent of the United States near General Carranza informed the Department of State on Oct. 21, 1915 that General Carranza would probably appoint a diplomatic representative to the United States very

shortly, that his grade would be that of minister plenipotentiary, and that the former grade of ambassador would not be revived. The Department instructed the Special Agent to call General Carranza's attention to the fact that he should consider the effect that the naming of a minister instead of an ambassador might have on the international prestige of Mexico and to say that the Government of the United States could not reduce the grade of its diplomatic representation in Mexico without an act of Congress. Secretary Lansing to Special Agent Belt, telegram of Oct. 27, 1915, MS. Department of State, file 701.1211/160.

The Minister of Foreign Affairs of Ecuador in 1936 wrote to the American Minister in that country requesting the *agrément* of the Government of the United States to the appointment of the Envoy Extraordinary and Minister Plenipotentiary of Ecuador at Washington as Ambassador Extraordinary and Plenipotentiary for the period of the boundary proceedings between Ecuador and Peru. The Department of State informed the American Minister that the *agrément* had been granted in order that the representative of Ecuador might have the same rank as the representative of Peru during these discussions on the understanding that this elevation in rank would in no way obligate the Government of the United States to raise the rank of the American Minister at Quito to that of Ambassador and with the understanding that, upon the conclusion of the boundary negotiations between Ecuador and Peru, the representative in question would resume his post as Minister of Ecuador. The Counselor of the Department of State (Moore) to the Minister to Ecuador (Gonzalez), no. 161, Aug. 10, 1936, MS. Department of State, file 701.2211/254.

Qualifications

While ambassadors and ministers are not required to undergo an examination, as are applicants for appointment to the career service, it is essential that they possess the capacity to perform the duties assigned them as the personal representatives of the President before the head of a foreign state.

The Chief of the Division of Foreign Service Administration (Davis) to Miss Lillie T. Bitting, Aug. 22, 1939, MS. Department of State, file 121.41/102.

Resignations

. . . It is customary for American Ambassadors and Ministers, when a new President comes into office, to place their resignations in his hands, so that he shall be entirely free to make such nominations as he shall deem appropriate. However, it is not unusual for a new President to ask an appointee of a former administration to continue to serve, particularly in the cases of those officers who have been promoted from the career ranks of the American Foreign Service.

The Assistant Secretary of State (Carr) to John D. Lynch, Feb. 16, 1935, MS. Department of State, file 121.41/56.

CREDENTIALS AND RECEPTION

LETTERS OF CREDENCE

§382

The scope and nature of letters of credence have been thus described :

Letters of credence are usually limited to a request by the accrediting government that matters presented in its name by its representative shall be given full faith and credit by the government to which he is accredited.

The Second Assistant Secretary of State (Adee) to Warren N. Ahers, Oct. 9, 1920, MS. Department of State, file 701.6111/490.

. . . the only difference between a letter of credence for an Ambassador and one for a Minister is in that part of the letter which shows the rank of the officer accredited, that is, "Ambassador Extraordinary and Plenipotentiary" or "Envoy Extraordinary and Minister Plenipotentiary", as the case may be.

The Ceremonial Officer of the Department of State (Cooke) to the Secretary to the Japanese Ambassador (Takase), Apr. 4, 1936, MS. Department of State, file 121.41/64.

On Oct. 9, 1920 the Department of State, replying to an inquiry as to the contents of the letters of credence of Mr. Bakhmeteff, the Russian Ambassador to the United States, stated that, since letters of credence of an ambassador are addressed by the head of the accrediting state to the head of the state to which the diplomatic representative is accredited, it would not feel privileged to make public the contents of the letters presented by Mr. Bakhmeteff without his approval. The Second Assistant Secretary of State (Adee) to Warren N. Ahers, Oct. 9, 1920, MS. Department of State, file 701.6111/490.

It is not customary for the President of the United States to reply to letters of credence of newly appointed foreign ambassadors and ministers.

The Special Assistant to the Secretary of State (Dunn) to the Assistant Secretary to the President (McIntyre), June 18, 1934, MS. Department of State, file 701.5511/345.

It is true in the case of monarchies where the sovereignty of the State appears in the person of the Sovereign, [that] his death or abdication terminates the missions sent or received by him and requires the issuance of new credentials to envoys remaining at their posts. But such is not the case with republics, where the sovereignty appears in the people and not in an individual; so that there is no change of sovereignty by a change in the person of the Executive, and consequently no necessity for new letters of credence. Thus, it has not been the practice of this government to issue new letters of credence to envoys remaining at their posts on the change of an administration, nor

Change of
adminis-
tration

does the Department recall that this has been customary with other republics.

For these reasons, there does not appear to exist any need of a second formal reception of you by the President, the recognition heretofore accorded you being a sufficient acknowledgment of your official status. However, if you so desire, I shall be glad to receive and transmit to their high destination the letters issued to you by President Lopez, without, however, establishing a precedent that would require the issuance of new letters of credence in similar circumstances to a Minister of the United States at Tegucigalpa.

The Secretary of State (Colby) to the Honduran Minister (Gutierrez), May 25, 1920, MS. Department of State, file 701.1511/121.

**Duration of
letters of
credence**

On October 26, 1937 the Minister to Honduras informed the Department of State that the Minister of Foreign Affairs of that country, Señor Don Julio Lozano, former Honduran Minister at Washington, whose letter of credence as such had not been withdrawn, was about to resign his portfolio and that the President of Honduras wished to reappoint him as Minister at Washington. The Department instructed the Minister in Honduras to inform Señor Lozano that he was still considered by the Government of the United States to be the Honduran Minister to this country, that it would therefore not be necessary for him to present new letters of credence, and that the only formality necessary would be for him to inform the Secretary of State when he resumed his duties as Minister of Honduras.

Secretary Hull to the Legation in Honduras, telegram 40, Oct. 27, 1937, MS. Department of State, file 701.1511/293.

**Provisional
recognition**

Subsequent to the exchange, on November 8, 1921, of ratifications of the treaty establishing friendly relations between Austria and the United States, the American Commissioner in Vienna was instructed that diplomatic relations between the United States and Austria might be resumed. He was requested to ask provisional recognition as Chargé d'Affaires pending the arrival of his letters of credence and to request the Austrian Foreign Office to recognize the diplomatic secretaries of his staff and a military attaché.

Secretary Hughes to the American Mission in Vienna, telegram 365, Nov. 19, 1921, MS. Department of State, file 123F861/132a.

In informing the Legation in Bolivia on Oct. 12, 1932 that the appointment of Dr. Finot as Bolivian Minister at Washington would be agreeable to the President of the United States, the Secretary of State said that, while Dr. Finot could not be recognized officially pending the presentation of his letters of credence, the Department of State would, upon being informed of his actual appointment in the capacity named, be willing to deal with him informally until his audience with the President. Secretary Stimson to

the Legation in Bolivia, telegram 38, Oct. 12, 1932, MS. Department of State, file 701.2411/197A.

The Chilean Minister of Foreign Affairs telegraphed the Department of State in August 1931 requesting that Señor Cruchaga be considered accredited by that telegram in the capacity of Ambassador Extraordinary and Plenipotentiary of Chile to the United States and saying that the credentials were being forwarded by mail. The Department instructed the Embassy at Santiago to transmit a note to the Minister of Foreign Affairs saying that the President, pending the receipt of the actual letters, would be pleased to receive from Señor Cruchaga's hands a telegraphic copy of the text of his letters of credence and of the letters of recall of his predecessor. The Ambassador, it was explained, could not be considered as accredited until he had presented credentials to the President and the procedure suggested above was the one best calculated to meet the wishes of the Chilean Government for prompt action.

The Acting Secretary of State (Castle) to the Embassy in Chile, telegram 38, Aug. 31, 1931, MS. Department of State, file 701.2511/436.

In 1933 the Portuguese Minister of Foreign Affairs telegraphed the Secretary of State that the bag containing the credentials to be presented by the Portuguese Minister, Dr. João de Bianchi, had gone astray. He requested that the President consider Dr. João de Bianchi as accredited Portuguese Minister, new credentials being on the way. The Secretary replied that Dr. João de Bianchi had been given the status of Appointed Minister of Portugal, pending the arrival of his new letters of credence when an appointment would be arranged with the President for his formal audience and that the Department would be pleased to transact with him as Appointed Minister all business which might arise between the two Governments.

Secretary Hull to the Legation at Lisbon, telegram 11, Sept. 23, 1933, MS. Department of State, file 701.5311/127A.

The Danish Minister of Foreign Affairs informed the Secretary of State in September 1939 that the King of Denmark had agreed to receive in audience Mr. Atherton, Minister-designate to Denmark, prior to the presentation of his letters of credence, thus enabling him to enter immediately upon his duties as Minister.

Mr. Munch to Secretary Hull, telegram of Sept. 6, 1939, MS. Department of State, file 123At4/288.

The Department of State on August 23, 1907 informed Señor Ugarte, the Minister of the Provisional Government of Honduras, that, pending the return of the President to Washington and the presentation of his credentials, it would be pleased to transact any

necessary business with him pertaining to his mission, the President having directed the recognition of the Government which he represented.

Acting Secretary Adee to Minister Ugarte, no. 1, Aug. 23, 1907, MS. Department of State, file 7357/2; 1907 For. Rel., pt. II, p. 605.

To similar effect, see the Acting Secretary of State (Polk) to the Appointed Minister of Salvador, May 17, 1919, MS. Department of State, file 701.1611/89.

On October 3, 1919 Viscount Grey of Fallodon sent to the Department of State the office copy of his letters of credence as Ambassador Extraordinary and Minister Plenipotentiary of Great Britain on Special Mission. The Secretary of State informed him on October 10 that in view of the President's indisposition and his inability to receive him at that time he would be glad to accord him provisional recognition as Ambassador Extraordinary and Minister Plenipotentiary on Special Mission as of date of the presentation of the office copy of his credentials, formal recognition to be granted when the President received him in audience.

Secretary Lansing to Viscount Grey of Fallodon, Oct. 10, 1919, MS. Department of State, file 701.4111/289. See also Secretary Lansing to the Appointed Belgian Ambassador (Baron de Cartier de Marchienne), Oct. 10, 1919, *ibid.* 701.5511/124; the Acting Secretary of State (Phillips) to the Appointed Minister of Poland (Prince Casimir Lubomirski), Nov. 1, 1919, *ibid.* 701.60C11/18b.

PRESENTATION OF LETTERS OF CREDENCE

§383

The formalities usually observed in connection with the presentation of letters of credence are described as follows:

... Upon the arrival at the seat of mission, the newly appointed diplomatic representative shall request, through the actual incumbent of the mission, an informal conference with the Minister for Foreign Affairs, or such other officer of the government to which he is accredited as may be found authorized to act in the premises, in order to arrange for his official reception. He shall at the same time, in his own name, address a formal note to the Minister for Foreign Affairs, communicating the fact of his appointment and requesting the designation of a time and place for presenting his letter of credence and the letter of recall of his predecessor.

When the representative is accredited by the President to the Chief of State, he shall, on requesting audience for the purpose of presenting the original sealed letter of credence in person, communicate to the Minister for Foreign Affairs the open office copy thereof accompanying his original instructions.

If the diplomatic representative be of the rank of *chargé d'affaires*, bearing a letter of credence addressed to the Minister for Foreign Affairs, he shall, on addressing to the Minister the formal note, convey to him the office copy of his letter of credence and shall await the Minister's pleasure for presentation of the original.

... On the occasion of presenting letters of credence it is usual at most capitals for the incoming diplomatic representative to make a brief address. A representative of the United States delivering such address shall write and speak it in English. A copy of the address should be furnished the Minister for Foreign Affairs in advance. Copies of the address and of the reply must be sent to the Department.

... The newly appointed diplomatic representative should be accompanied by all Foreign Service officers assigned to the mission in a diplomatic capacity and by all attachés of the mission when presenting his letter of credence.

For. Ser. Reg. U.S. II-4, and nn. 1 and 2, Jan. 1941; Ex. Or. 8210, July 17, 1939.

"Presentation of Letters of Credence by an Ambassador"

"The newly-arrived Ambassador having called upon the Secretary of State and left a copy of his Letters of Credence with the Secretary, as well as a copy of the Letters of Recall of his predecessor and a copy of the remarks he will make upon the occasion of presenting his Letters of Credence to the President, an appointment for his reception by the President is made by the Chief of Protocol of the Department of State through the Executive Office. The appointed Ambassador is in due time notified of the day and hour upon which the President will receive him, and, at that time, he is called for at the Embassy by the Chief of Protocol accompanied by either the senior Military or Naval White House Aide (in full-dress uniform) in the President's automobile. The Department of State provides such other cars as may be necessary to accommodate the staff. . . . the Ambassador, in full uniform or formal day dress, awaits them with all the members of his staff (also in full uniform or formal day dress). . . .

"Upon the arrival of the party at the White House four White House Aides are awaiting the Ambassador in the entrance hall, and will precede the party into the Green Room.

"When the President is ready and standing in the center of the Blue Room, with the Military and Naval Aides to his right and left, a junior White House Aide announces to the Chief of Protocol that the President will be pleased to receive the Ambassador. The Ambassador, with the Chief of Protocol walking at his left, then enters the Blue Room by way of the corridor preceded by four White House Aides who take position uncovered in the Blue Room on either side of the entrance, the senior to the right of the President. Upon entering the Blue Room the Ambassador makes a short bow to the President. The Chief of Protocol at the same time presents him to the President, using his full title.

"The Ambassador then advances to where the President stands and shakes hands with him. He then presents his Letters of Credence and a copy of the remarks which he has prepared. In return he is handed a

copy of the President's remarks in reply. It should be noted that the remarks are not read. An informal conversation follows, after which the Ambassador asks permission to present his staff to the President. . . .

"Formal leave is then taken by the Ambassador. . . .

" . . . the Ambassador and his staff return to the Embassy in the same manner in which they were escorted to the White House.

"Exactly the same procedure as in the case of Ambassadors is followed in the presentation of Ministers to the President, with the exception that a Minister is preceded by two White House Aides instead of four."

The Chief of the Division of Protocol (Summerlin) to the Belgian Ambassador (Count Robert van der Straten-Ponthoz), May 2, 1938 (with enclosure), MS. Department of State, file 811.451/38.

The official duties of a diplomatic representative begin on the day of his formal reception by the Chief of State, or in the case of the *chargé d'affaires* by the Minister for Foreign Affairs. If the formal audience of reception is delayed, the Minister for Foreign Affairs may arrange for the transaction of diplomatic business with the new representative pending such reception.

For. Ser. Reg. U.S. II-5, Jan. 1941; Ex. Or. 8210, July 17, 1939.

LETTERS OF RECALL

§384

The following observations as to the procedure to be followed upon the reception by the President of retiring plenipotentiary representatives, addressed by the Under Secretary of State to the Secretary to the President, were approved by the President in 1927:

All plenipotentiary representatives—both Ambassadors and Ministers—present their Letters of Credence to the President at a formal audience at the White House, but it is the exception rather than the rule for a retiring Ambassador or Minister to present in person his Letter of Recall, such being usually presented by his successor at the time of the presentation of his Letter of Credence.

It has been the practice of the President, during this Administration at least, to receive Ambassadors, upon the relinquishment of their plenipotentiary capacity, in equally formal audience at the White House, whether they present at that time their Letters of Recall or merely take formal leave of the President. Irrespective of the practice followed in previous Administrations, it is my impression and recollection that at least one Minister who presented in person his Letter of Recall was received by the President at the Executive Office, and that an Assistant Secretary of State was present during the interview: all Ministers desiring to take final leave of the President without presentation of Letters of Recall have also been received at the Executive Office.

In view of the fact that the presentation of a Letter of Recall by a departing plenipotentiary representative may be considered as a ceremonial almost equal in importance with the presentation of a Letter of Credence, I therefore suggest, for the consideration of the President, that the following procedure be adopted, which, it is hoped, will occasion the President no additional inconvenience, and which will more nearly accord with the general practice of nations upon such ceremonial occasions:

1. That, as heretofore, presentation of all Letters of Credence take place at formal audience at the White House.

2. That presentation, in person, by Ambassadors Extraordinary and Plenipotentiary, and by Envoys Extraordinary and Ministers Plenipotentiary of their Letters of Recall, take place at formal audience at the White House.

3. That Ambassadors, when taking formal and final leave of the President, without presentation of Letters of Recall, be received in formal audience at the White House.

4. That Envoys Extraordinary and Ministers Plenipotentiary when taking final and formal leave of the President, without presentation of their Letters of Recall, be received at the Executive Office, and that an appropriate officer of the Department of State meet the Minister at the Executive Office and be present during the interview.

5. That the formalities to be observed at such ceremonies as shall take place at the White House shall be identical with those observed upon the occasion of the presentation of Letters of Credence by such officers—with the exception that in no case shall the retiring Chief of Mission be accompanied by any members of his staff.

The Under Secretary of State (Wright) to the Secretary to the President (Sanders), Jan. 21, 1927, MS. Department of State, file 701.5711/260.

. . . no distinction is made in the treatment of retiring ambassadors making their last call on the President whether or not they present their letters of recall.

An ambassador's farewell call upon the President is generally an informal one and does not partake of the ceremony attending the formal audience of a newly arrived ambassador when he presents his credentials, and usually the letters of recall of his predecessor.

The Under Secretary of State (Phillips) to the Ambassador in Turkey (Skinner), no. 160, Feb. 18, 1935, MS. Department of State, file 701.9467/22.

In 1934 it was decided in the Department of State simply to file the letters of recall of a retiring ambassador or minister with the letters of credence of the new ambassador or minister without making any reply to the former.

Memorandum of the Division of International Conferences and Protocol, Mar. 24, 1934, MS. Department of State, file 701.48A11/83.

ACCEPTABILITY OF AMBASSADOR OR MINISTER

§385

Since the establishment and maintenance of diplomatic relations between two states must of necessity be mutually agreeable to them and since this may, and often does, depend upon the personal characteristics of the chief of mission, his known or reputed attitude toward the receiving state, and whether he would be *persona grata* to that state, it is the invariable practice of the sending state to inquire before making an appointment of an ambassador or minister whether the person about to be appointed would be acceptable to the receiving state. This is generally referred to in diplomatic parlance as obtaining an *agrément* for the appointee. Likewise, a diplomatic officer who has been received may become *persona non grata*, resulting in a request by the receiving state for his recall, or, in aggravated cases, in the handing to him by the receiving state of his passport.

Upon the appointment of an ambassador or minister by the President, inquiry is made through the Department of State of the head of the government to which he is to be accredited whether the appointment is agreeable to that government. Upon the receipt of a reply in the affirmative, the name of the ambassador or minister is sent by the President to the Senate for confirmation of his appointment in conformity with the provisions of Paragraph 2, Section 2, Article II of the Constitution of the United States.

The Chief of the Division of Foreign Service Administration (Hengstler) to Lester Holyfield, Jan. 25, 1934, MS. Department of State, file 121.41/43.

It is contrary to the custom of nations in their international relations for one government to intimate in any way to another that the appointment of a particular person as ambassador or minister from the latter would be agreeable to it.

The Acting Secretary of State (Wilson) to Henry Clews, May 3, 1912, MS. Department of State, file 701.6511/126.

On February 3, 1917 the Appointed Austro-Hungarian Ambassador to the United States, Count Tarnowski, expressed the desire to present his credentials to the President. He was informed by the Department of State shortly thereafter that in view of the receipt, on January 31, of the Austrian note on submarine warfare—a note almost identical with a note of the same date from the German Government, which had caused the Government of the United States to sever diplomatic relations with the German Empire—it was impossible for the Government of the United States to receive an Ambassador from Austria-Hungary unless the latter Government receded from the position taken in the note. The Austro-Hungarian

Refusal to
receive

Government in a note of March 2 upheld the principle of its declaration of January 31. The Department of State informed the Ambassador in Vienna on March 18, and again on March 28, that in the face of this positive declaration the Government of the United States could not receive Count Tarnowski but that he had been informally received at the Department whenever he wished and that all possible consideration had been shown him.

Secretary Lansing to Ambassador Penfield, telegrams 1567, 1606, and 1624, Feb. 23, Mar. 18, and 28, 1917, MS. Department of State, files 701.6311/267a, /269, 124.63/19a; 1917 For. Rel., Supp. 1, pp. 143, 173, 188.

On December 1, 1915 the Secretary of State orally informed the German Ambassador that Captain Boy-Ed, German naval attaché, and Captain von Papen, German military attaché, were both unacceptable to the Government of the United States, which desired them withdrawn from the country. Confirming this conversation he wrote to the Ambassador on December 4 that, various facts and circumstances having come to the knowledge of the Government of the United States as to the connection of these men with the illegal and questionable acts of certain persons within the United States, the President had reached the conviction that their continued presence as attachés of the German Embassy would no longer serve the purpose of their mission and would be unacceptable to the Government of the United States. He repeated the request that the German Government withdraw them immediately from their official connection with the Imperial German Embassy. Publicity was given to the request on the same day. The Ambassador wrote informally to the Secretary on December 5 saying that the German Government considered that it was entitled to expect that the request for recall would not be made public until the Imperial German Government had been given an opportunity to be heard from and that it regretted that the Government of the United States had neglected this courtesy, which it asserted to be customary between friendly nations. He said also that before his Government answered the request of the Government of the United States it wished to be informed as to the facts which had induced the Government of the United States to ask for the recall of the two attachés. The Secretary replied informally:

Request for
recall of
German
attachés,
1915

As I have informed you, the request for the recall of the two attachés of your Embassy was made only after careful consideration of numerous facts and circumstances which convinced this Government that the two officers could no longer be considered *personae gratæ* to this Government and that, therefore, their continuance in the United States with diplomatic immunities would be unacceptable. Having reached this conviction only after mature deliberation, this Government believed that the

announcement to the Imperial Government of the fact that Captains Boy-Ed and vonPapen were unacceptable and that their recall was desired would result in their immediate withdrawal without demur or question. Holding that belief as to the course which the Imperial Government would pursue and which is in accord with the custom of nations when requests of this nature are made, this Government perceived no reason for keeping secret its action. It regrets that the Imperial Government considers that in giving publicity to its action this Government showed any discourtesy to your Government, but as it holds that its course involved no impropriety it could not be expected to express any regret for having taken that course.

It is a matter of surprise to this Government that the Imperial Government should not act immediately upon the request for recall as this Government has stated that the two attachés are *personae non gratae*. I am sure you will realize that whatever may be the reasons for the request this Government and not the Imperial Government is the one to judge of their sufficiency to support a conclusion as to the acceptability to this Government of members of a German diplomatic mission. Whether the primary grounds for this Government's request are based on legal proof, on presumption, or on mere suspicion of conduct displeasing to it appears to me immaterial in view of the fact that Captains Boy-Ed and vonPapen are no longer acceptable.

As I stated briefly in my letter to Your Excellency on the 4th instant reciting the oral statement which I made to you on December 1st, the relation of the two attachés to persons engaged in illegal or questionable practices was known. I will mention vonWedell, Ruroede, Rentlen, Stegler, Buenz, Archibald, and Marcus Braun as the names of some of the persons who have offended. I might refer to other men and furnish facts as to their activities but as these are also at the present time the subject of official investigation, to do so might prevent the apprehension of those who have violated or are violating the laws of this country.

Though, as I have already stated in this letter, I consider that this Government is required to do no more than to express its wish that Captains Boy-Ed and vonPapen should be recalled because they have become *personae non gratae*, I have made the foregoing statement in order that your Government, if it so desires, may investigate the conduct of its attachés. Moreover, to be more explicit as to the facts might interfere with certain investigations now being conducted by this Government, might close valuable channels of information, and might thus defeat the ends of justice, while it might draw forth grounds of suspicions which would tend to jeopardize rather than improve the friendly relations of both countries. I need not inform Your Excellency that it is the sincere wish of this Government to avoid differences of this nature when it can do so consistently with its dignity and its duty.

On December 10 the Ambassador notified the Secretary that His Majesty the Emperor and King had been pleased to recall the two

attachés. The Secretary informed the Ambassador on the following day that he had requested the powers at war with the German Empire to grant safe-conducts for these men and their two servants. He said that, upon being notified that their successors had been designated and after the Government of the United States had decided upon their acceptability, he would request the same powers to provide safe-conducts for their passage to the United States. He wrote further to the Ambassador on December 15 that he had been informed by the British and French Ambassadors that safe-conducts would be furnished to the former attachés for their return to Germany, it being understood that they were to take the southern route to Holland. It was also understood, he concluded, that they would "of course, perform no unneutral act, such as carrying dispatches to the German Government". On December 18 he transmitted to the Ambassador two authenticated sets of copies of notes from the British and French Ambassadors which he said he had been assured would be regarded by officers of the Allied cruisers as safe-conducts, provided the two men followed the southern route to Holland. He enclosed a passport for each of the former attachés.

Memorandum of interview of the Secretary of State with the German Ambassador, Dec. 1, 1915, MS. Department of State, file 701.6211/325½; Secretary Lansing to Count von Bernstorff, no. 1686, Dec. 4, 1915, *ibid.* /360a; Count von Bernstorff to Mr. Lansing, Dec. 5, 1915, and Mr. Lansing to Count von Bernstorff, Dec. 6, 1915, *ibid.* /332; Mr. Lansing to Count von Bernstorff, Dec. 11, 15, and 18, 1915, *ibid.* /360c, /361c, /329; 1915 For. Rel. Supp. 947-953.

On September 8, 1915 the Ambassador in Austria-Hungary was instructed to present a note to the Foreign Office saying that the Austro-Hungarian Ambassador in Washington, Dr. Dumba, had admitted proposing to his Government plans to instigate strikes in American munitions-manufacturing plants and that this information had been obtained through a copy of a letter of the Ambassador to his Government, the bearer of which was an American citizen traveling under an American passport whom the Ambassador had admitted employing to bear official despatches from him to his Government. The Ambassador was instructed to inform the Foreign Office that Dr. Dumba was no longer acceptable to the Government of the United States as the Austro-Hungarian Ambassador in Washington by "reason of the admitted purpose and intent of Mr. Dumba to conspire to cripple legitimate industries of the people of the United States and to interrupt their legitimate trade, and by reason of the flagrant violation of diplomatic propriety in employing an American citizen protected by an American passport as a secret bearer of official despatches through the lines of the enemy of Austria-Hungary". The Ambassador was also instructed to say that the Government of the United

Request for
recall of
Austro-
Hungarian
Ambassador,
1915

States had no alternative but to request the recall of Dr. Dumba on account of his improper conduct. The astonishment of the Austro-Hungarian Government at the publication of the note requesting the recall of its Ambassador, which appeared in the British, French, and German press simultaneously with its receipt by the Ministry of Foreign Affairs in Vienna, was expressed to the American Ambassador by the Minister of Foreign Affairs on September 19, 1915. Surprise was also expressed at the contents of a telegram of September 17 from the Department of State, communicated to the Austro-Hungarian Foreign Office, to the effect that the Department would be prepared to request safe-conduct for Dr. Dumba from the British and French Governments upon receipt of information that he had been definitely recalled. The Minister stated that his Government could, as a matter of course, have no thought of continuing an Ambassador at Washington who had become *persona non grata* but that he could not peremptorily be recalled before some report in the premises had been received from him. If it were not possible to receive that report from him through the Department of State, Dr. Dumba would be directed to proceed to Vienna, he said, to make a verbal explanation, in which case there could of course be no question of his return to Washington.

The Department instructed the Ambassador, on September 22, to explain to the Minister of Foreign Affairs that there were only two courses open to the Government of the United States in this case, either to hand Dr. Dumba his passports or to request his recall, and that it chose the latter course as the more considerate. The fact was, it was said, that Dr. Dumba was *persona non grata* but that his immediate recall did not imply condemnation of him by the Austro-Hungarian Government but only his unacceptability to the Government of the United States. The Department said that it was at a loss to understand why a report from him should be awaited and repeated the request that he be recalled immediately.

On the same day Dr. Dumba informed the Department that leave of absence had been granted him officially by his Government and requested a safe-conduct for himself and his wife on a steamship sailing within a week. The Department replied that it was still awaiting a definite reply from Vienna to its instruction of September 8 requesting his recall. On September 24 the American Ambassador reported that the Austro-Hungarian Minister of Foreign Affairs was sending through the good offices of the American Embassy a telegram to be delivered to Dr. Dumba directing him to proceed to Vienna. The Minister of Foreign Affairs requested, he said, that a safe-conduct for him and his family be obtained from the British and French Governments and stated that, as a matter of course, Dr. Dumba's

recall from Washington was final. On September 27 the Department of State informed Dr. Dumba that it had been notified by the British Embassy in respect to a certificate of safe-conduct for Madame Dumba that the British Government did not regard women as combatants and would act in conformity with usages of international law. On the same day Dr. Dumba informed the Department that he was prepared to leave Washington in accordance with instructions received from his Government. The Department replied that, having been informed through the American Ambassador in Vienna that he had been recalled from Washington and in view of his statement, it had requested of the British and French Embassies safe-conducts for him and his valet. On October 1 the Department forwarded to the Austro-Hungarian Embassy two notes from the British and French Embassies, respectively, saying that the necessary instructions had been issued to the British and French naval vessels not to prevent the passage of Dr. Dumba to Europe on the steamship *Nieuw Amsterdam*, it being understood that he would abstain from any unneutral act during the voyage.

The Department learned on October 2 that on September 30 the Austro-Hungarian Minister of Foreign Affairs had written to the American Ambassador acknowledging his note stating that Dr. Dumba was no longer acceptable to the Government of the United States as Ambassador of Austria-Hungary and saying that he was in no doubt as to the conclusions to be drawn from that note with regard to the further retention of Dr. Dumba in Washington. He expressed the opinion that diplomatic correspondence, especially between an Ambassador and his Government, no matter in what manner transmitted, should not be made the subject of an official criticism from a government for which this correspondence was not intended and to whose attention it could come only by accident. On November 8, 1915 the Minister of Foreign Affairs requested the American Ambassador in Vienna to inform the Government of the United States that Dr. Dumba had been recalled from his post at Washington.

Secretary Lansing to Ambassador Penfield, telegram 887, Sept. 8, 1915, MS. Department of State, file 701.6311/145a; Mr. Penfield to Mr. Lansing, telegram 908, Sept. 19, 1915, and the Acting Secretary of State (Polk) to Mr. Penfield, telegram 908, Sept. 22, 1915, *ibid.* /153; Mr. Polk to Mr. Penfield, telegram 910, Sept. 22, 1915, *ibid.* /156; Mr. Penfield to Mr. Lansing, telegram 913, Sept. 24, 1915, *ibid.* /166; Mr. Polk to Mr. Penfield, telegram 917, Sept. 28, 1915, *ibid.* /173b; the Department of State to the Austro-Hungarian Embassy, Oct. 1, 1915, *ibid.* /173; Mr. Penfield to Mr. Lansing, telegram 920, Sept. 30, 1915, *ibid.* /177; the Austro-Hungarian Minister of Foreign Affairs (Burian) to Mr. Penfield, Nov. 8, 1915 (enclosure in despatch 932 from the American Embassy at Vienna, Nov. 10, 1915), *ibid.* /196. 1915 For. Rel. Supp. 933-947.

The Secretary of State wrote to the Italian Ambassador on April 2, 1941 that various facts and circumstances had come to the attention of the Government of the United States connecting the naval attaché of the Royal Italian Embassy "with the commission by certain persons of acts in violation of the laws of the United States" and that the President had directed him to notify the Ambassador that the attaché was *persona non grata* and to request that he be withdrawn immediately from the United States.

The Secretary of State (Hull) to the Italian Ambassador (Del principi Colonna), Apr. 2, 1941, MS. Department of State, file 701.6511/1012; Department of State, IV *Bulletin*, no. 93, p. 420 (Apr. 3, 1941).

NATIONALITY AS OBSTACLE TO RECEPTION

§386

The Government of the United States "could not . . . agree to the appointment of an American citizen as a foreign Ambassador or Minister accredited to this Government".

The Chief of the Division of Protocol (Summerlin) to J. E. Korshak, May 20, 1938, MS. Department of State, file 701.0011/278.

In this letter the Department enclosed a copy of a circular note sent to all foreign embassies and legations in Washington on January 27, 1906, in which it was said that in the future publications of the Diplomatic List only such officers and attachés of foreign missions in the United States as were not citizens of the United States would be included. The Government of the United States did not object, it was said, to the employment by embassies and legations of American citizens as counselors, but the inclusion of the names of such persons in the Diplomatic List would seem to warrant the presumption that such person might be called upon to participate in the diplomatic representation of the country to whose service he might appear to be attached—a presumption to which the Department considered it inadvisable to give any support. MS. Department of State, 7 Notes to the Argentine Republic, 160-161.

In 1907 the Government of Venezuela recognized one of its citizens, Señor Planas Suarez, as Envoy Extraordinary and Minister Plenipotentiary of the Republic of Nicaragua. The American Minister in Venezuela asked the Department of State for an expression of its opinion of his status, saying that Señor Suarez had placed himself apart from the other members of the Diplomatic Corps by waiving all his diplomatic immunities and privileges under international law. The Department replied that—

the right of any government to decline to receive one of its own citizens as the representative of another government is generally recognized and has been asserted on several occasions by the

Government of the United States. (See Moore's Digest, vol. 4, pp. 549-553.) While insisting upon the right in some instances, it has been waived without prejudice in others.

The subject of the status of Señor Planas Suarez does not appear to call for any formal expression of opinion in the absence of any case arising affecting his relations to the other members of the diplomatic corps in any matter affecting diplomatic privileges.

Acting Secretary Adee to Minister Russell, no. 92, June 28, 1907, MS. Department of State, file 6663/1; 1907 For. Rel., pt. II, pp. 1092, 1093.

The Siamese Minister wrote a personal note to the Secretary of State in December 1910 saying that he wished to confer upon a certain American citizen the title of Honorary Secretary of the Siamese Legation at Washington and inquiring whether the Department of State would have any objection. The Department stated that it would have no objection to the conferring of the title but that the person's name could not be included in the Diplomatic List as a member of the Legation, that he could not be granted any of the privileges or immunities accorded to members of the Diplomatic Corps nor be absolved from any of his obligations as an American citizen.

Secretary Knox to Minister Varadhara, Dec. 28, 1910, MS. Department of State, file 701.9211/21.

On learning that a certain gentleman might be appointed as Lithuanian Minister at Washington, the Department of State, in 1928, instructed the Legation in Riga that before taking up the question of his *agrément* with the President the Department wished to be informed regarding his nationality, since he had become a naturalized American citizen in 1912 and had been issued an American passport in 1919. It was explained that the established policy of the Government of the United States was not to receive American citizens as diplomatic representatives of foreign governments and that, while it seemed likely that the man in question had been subject to the presumption of loss of citizenship under the act of March 2, 1907, it seemed desirable for him to have his American citizenship completely terminated by the taking of an oath of allegiance to Lithuania or by obtaining naturalization in that country.

Secretary Kellogg to the American Legation, telegram 30, May 19, 1928, MS. Department of State, file 701.60m11/47.

END OF MISSION

§387

Nicaragua,
1909

In a note of December 1, 1909 announcing the reasons for the severance of diplomatic relations by the Government of the United States with the government of President Zelaya in Nicaragua, the Chargé d'Affaires of that government was informed by the Secretary of State that his office was at an end. The Secretary enclosed the Chargé's passport in case he wished to leave the United States. He added:

... although your diplomatic quality is terminated, I shall be happy to receive you, as I shall be happy to receive the representative of the revolution, each as the unofficial channel of communication between the Government of the United States and the *de facto* authorities to whom I look for the protection of American interests pending the establishment in Nicaragua of a Government with which the United States can maintain diplomatic relations.

Secretary Knox to Chargé Rodriguez, Dec. 1, 1909, MS. Department of State, file 6369/346A; 1909 For. Rel. 455, 457.

Germany,
1917

In a note of February 3, 1917 to the German Ambassador the Secretary of State said that he had been directed by the President to announce to him that "all diplomatic relations between the United States and the German Empire" were severed in view of the position taken by the German Government in respect to submarine warfare, and that the American Ambassador at Berlin would be immediately withdrawn. In accordance with this announcement, he said, he had been directed by the President to deliver to the Ambassador his passports.

Secretary Lansing to Count von Bernstorff, no. 2307, Feb. 3, 1917, MS. Department of State, file 763.72/3179; 1917 For. Rel., Supp. 1, pp. 106, 108.

Austria-
Hungary,
1917

On April 9, 1917 the Austro-Hungarian Chargé d'Affaires ad interim notified the Secretary of State, under instructions from his Government, that in consequence of the resolution of Congress declaring the existence of a state of war between the United States and Germany the relations between the United States and Austria-Hungary had come to an end. The Appointed Ambassador, Count Tarnowski, he said, had been instructed to return to Austria-Hungary with the personnel of the Embassy and Consulates and to turn over the protection of Austrian and Hungarian subjects in the United States to the Swedish Legation in Washington. Upon receiving this note the Secretary on the same day handed the Chargé d'Affaires passports for him and his suite and for the Appointed Ambassador.

On April 10 the Department instructed the Embassies in London and Paris to obtain safe-conducts for the Austro-Hungarian diplomatic and consular officers as well as for the German diplomatic and consular officers returning from China via the United States. Both the British and French Foreign Offices gave assurances that such safe-conducts would be granted.

Chargé Zwiedinek to Secretary Lansing, Apr. 9, 1917, and Mr. Lansing to Mr. Zwiedinek, Apr. 9, 1917, MS. Department of State, file 701.6311/276; Mr. Lansing to the Ambassador in Great Britain (Page), telegram 4667, Apr. 10, 1917, *ibid.* /279a; Mr. Page to Mr. Lansing, telegram 6036, Apr. 19, 1917, *ibid.* /280; the Ambassador in France (Sharp) to Mr. Lansing, telegram 2031, Apr. 20, 1917, *ibid.* /281. See also 1917 For. Rel., Supp. 1, pp. 594, 595, 597. As to safe-conducts, see *post*, §388.

The Russian Ambassador, Bakhmeteff, on April 28, 1922 wrote to the Secretary of State saying that he had remained at his post in Washington since July 1917, when he was received as Ambassador, in order to protect Russian national interests and to facilitate the liquidation and final settlement of a large volume of commercial business for which the Government of Russia stood obligated. He stated that the work of liquidation had been brought "to a practical close" and that he questioned whether his continuance as Ambassador of Russia would longer serve the best interests of his country and the convenience of the Government of the United States. He declared his readiness, if this Government so desired, to retire and terminate his official functions. He suggested that Serge Ughet, financial attaché of the Russian Embassy, be recognized as custodian of the Russian property for which he, Bakhmeteff, was responsible and as the agent through whom pending business could be transacted and terminated. The Secretary concurred in his suggestions, stating that he would continue to be recognized as Ambassador until June 30 following.

Russia,
1922

Ambassador Bakhmeteff to Secretary Hughes, Apr. 28, 1922, MS. Department of State, file 701.6111/591; Mr. Hughes to Mr. Bakhmeteff, Apr. 29, 1922, *ibid.* /590; 1922 For. Rel., vol. II, pp. 875-877.

In informing the Board of Commissioners of the District of Columbia that after July 1, 1922 the Russian Embassy building would be closed, the Department of State said:

The Embassy building and grounds being the property of the Russian Government, the diplomatic status of the building remains unchanged.

The Third Assistant Secretary of State (Bliss) to the Board of Commissioners of the District of Columbia, June 29, 1922, MS. Department of State, file 701.6111/609a.

On October 21, 1933 Mr. Ughet wrote to the Department of State expressing the belief that conditions would arise in the near future of such character that no further useful purpose would be served by his continuing to exercise the duties with which he was charged under the exchange of notes between the Russian Ambassador and the Secretary of State of April 28 and 29, 1922 (*ante*), and requesting that his existing status be discontinued at the earliest convenience of the Department. The latter replied on November 16, 1933 informing him that, in view of the recognition of the Union of Soviet Socialist Republics by the Government of the United States, that Government ceased on that day to recognize him as Russian financial attaché.

Acting Secretary Phillips to Mr. Ughet, Nov. 16, 1933, MS. Department of State, file 701.6111/729A.

Austria,
1938

On March 17, 1938 the Austrian Minister informed the Department of State that as a result of developments in Austria that country had ceased to exist as an independent nation and had been incorporated in the German Reich, that therefore the Austrian mission to the United States had been abolished, and that the affairs of the mission had been taken over by the German Embassy. The German Ambassador had informed the Department on March 16 that the former Austrian Legation building had become the property of the German Government and formed part of the German Embassy.

Memorandum of telephone conversation between the Austrian Minister (Prochnik) and the Adviser on Political Relations (Dunn), Mar. 17, 1938, MS. Department of State, file 701.6311/391; Secretary Hull to the Embassy in Berlin, telegram 27, Mar. 19, 1938, *ibid.* /390B; Ambassador Dieckhoff to Mr. Hull, Mar. 16, 1938, *ibid.* /390.

Albania,
1939

On June 24, 1939 the Albanian Minister in Washington called on the Secretary of State at the latter's request. The Secretary informed him that the Minister of Foreign Affairs of Albania had officially notified the Government of the United States on June 5 that the Albanian and Italian Governments had signed an agreement on June 3 whereby the diplomatic and consular officers of the two countries were unified and the Albanian Foreign Office abolished; at the same time the American Legation in Tirana had been notified by the Albanian Minister of Foreign Affairs that the Albanian Government was incompetent to accord in the future the usual privileges and immunities to foreign representatives in Albania. The Secretary stated that he regretted to inform the Minister that the Government of the United States, having felt obliged to order its Minister home, was no longer in a position to extend privileges and immunities to the Albanian Minister.

Memorandum of conversation between the Secretary of State (Hull) and the Albanian Minister (Konitza), June 24, 1939, MS. Department of State, file 701.7511/44.

After the breaking off of diplomatic relations between the United States and Turkey in April 1917, the Department of State instructed the Legation in Stockholm to request the Swedish Foreign Office to inform the Turkish Government on behalf of the Turkish Chargé d'Affaires in Washington that the Chargé wished to be informed to whom he should hand over the Turkish interests in the United States and that he wished to remain in the United States temporarily on account of the ill-health of his wife and himself. The Department said that the Government of the United States did not object to their remaining in the United States.

Continued
sojourn

Secretary Lansing to the American Legation at Stockholm, telegram 165, Apr. 24, 1917, MS. Department of State, file 701.6711/132a.

On January 10, 1906 the American Minister to Venezuela informed the Venezuelan Minister of Foreign Affairs that the French Government had decided to discontinue diplomatic relations with the Government of Venezuela and to withdraw its representatives from Caracas; he stated that he had been instructed to take charge of the property in and the archives of the French Legation and to assume friendly care of the interests of French citizens in Venezuela temporarily.

Withdrawal
of French
Chargé in
Venezuela

On January 14 the French Chargé d'Affaires, Mr. Taigny, went on board a French vessel in the port of La Guaira and was detained on board by the Venezuelan authorities and obliged to leave on that vessel before he had received his passports. The Diplomatic Corps in Caracas addressed a note of protest to the Minister of Foreign Affairs, who replied that the Chargé had no diplomatic character after the American Minister's note of January 10. The Diplomatic Corps responded, stating that the exchange of notes between the American Minister and the Venezuelan Minister of Foreign Affairs did not cause the French Chargé to lose his diplomatic character.

The Department of State subsequently informed the American Minister that the Government of the United States concurred in the position which it was assumed was taken by the powers that "under international law, diplomatic immunities and the right to be protected attach to a diplomatic agent, even though his powers to represent and negotiate for his government may have been suspended or terminated by recall or otherwise, so long as he may be within the jurisdiction of the state to which he has been accredited, a reasonable time for his withdrawal therefrom being accorded".

Minister Russell to Secretary Root, no. 48, Jan. 21, 1906, MS. Department of State, file 60 Despatches, Venezuela; Mr. Root to Mr. Russell, no. 35, Apr. 2, 1906, *ibid.* 5 Instructions, Venezuela, 395-396; 1906 For. Rel., pt. II, pp. 1448, 1456.

In a note to the Brazilian Ambassador in the United States in 1908, when the Brazilian Minister to Venezuela had charge of American interests in that country, the Department of State said:

"Concerning the question of diplomatic immunities, the Department of State holds that both international law and international courtesy assure to diplomatic agents, in the countries to which they are accredited, the right to be protected, although their powers to represent and negotiate for their Governments have been suspended or terminated by recall, or otherwise, and that the diplomatic immunity inherent in the persons of diplomatic agents extends for a reasonable time after the cessation of diplomatic functions in order that they may complete their arrangements to leave the country." Acting Secretary Adee to Ambassador Nabuco, no. 63, July 23, 1908, MS. Department of State, file 4832/34; 1908 For. Rel. 828.

On June 13, 1908 the Department of State informed the American Chargé d'Affaires in Venezuela of the decision of the Government of the United States to sever diplomatic relations with the Venezuelan Government. He was instructed to apply for his passports and for a safe-conduct until his departure from the appropriate port and to close the Legation in Caracas, leaving the building with its archives and property in charge of a Legation clerk, under the direction and protection of the Brazilian Chargé d'Affaires. He was also instructed to make arrangements for continuing the rental of the premises theretofore occupied as a Legation and to proceed to Puerto Cabello, where a United States naval vessel would be prepared to receive him. The contents of the instruction having been communicated to the Venezuelan Foreign Office, the Foreign Minister replied that, since it was the Government of the United States which had placed an end to the Chargé's diplomatic functions in Venezuela and since the Venezuelan Government had no cause for complaint respecting him personally, it would preserve him in the enjoyment of his diplomatic immunities and prerogatives until his embarkation at Puerto Cabello. The Minister explained that since the actual situation in respect to the United States was not that of war, in which case it would be proper to issue a safe-conduct to the diplomatic agent crossing the territory, the Venezuelan Government did not consider it necessary or fitting to issue him a safe-conduct for his journey to Puerto Cabello.

Secretary Root to Chargé Sleeper, telegram of June 13, 1908, MS. Department of State, file 4832/9A; the Minister of Foreign Affairs of Venezuela (Paul) to Mr. Sleeper, June 20, 1908 (enclosure to despatch 335, June 22, 1908), *ibid.* /21-29; 1908 For. Rel. 820, 823.

American
Chargé in
Venezuela,
1908

Belgium,
1917

In a statement issued to the press on March 24, 1917 by the Department of State with reference to an instruction, sent on the previous

day by direction of the President, to the Minister at Brussels to withdraw from Belgium with all diplomatic and consular officers and to take up his official residence at Le Havre, it was said:

When diplomatic relations with Germany were broken off the normal procedure would have been to withdraw the Minister at Brussels and the American members of the relief commission. Both this Government and the commission [the Commission for Relief in Belgium], however, felt a heavy moral responsibility for the millions of innocent civilians behind the German lines, and it was decided that the work of the commission must be kept going despite all difficulties until continued American participation became impossible. . . .

Immediately after the break in relations the German authorities in Brussels withdrew from Mr. Whitlock the diplomatic privileges and immunities which he had until that time enjoyed. His courier service to The Hague was stopped; he was denied the privilege of communicating with the Department of State in cipher, and later even in plain language.

1917 For. Rel., Supp. 1, pp. 656-657.

In 1936 the Iranian Government withdrew its representatives in the United States and closed its Legation in Washington. The Iranian Chargé d'Affaires explained that this withdrawal would in no way affect the status of the American Legation in Teheran and that the Iranian Government would continue to conduct business with that Legation.

Iranian
Chargé in
U. S.,
1936

Secretary Hull to the American Legation in Teheran, telegram 16, Mar. 31, 1936, MS. Department of State, file 701.9111/510.

RIGHTS AND DUTIES OF DIPLOMATIC REPRESENTATIVES

TRANSIT

§388

Attorney General Moody advised the Secretary of Commerce and Labor in 1905 that a head tax of two dollars imposed, under section 1 of the act of Congress of March 3, 1903 (32 Stat. 1213), upon every passenger not a national of the United States or of Canada, Cuba, or Mexico coming into the United States, was in the nature of a charge imposed upon the transportation company for every passenger brought into the United States by it and not a tax upon the officials of foreign governments, and that it was applicable to alien officials coming into the United States on diplomatic missions.

The Department of Commerce and Labor subsequently inquired of the Department of State regarding the exemption from the operation

of the head tax of a Russian Chargé d'Affaires ad interim in Mexico *en route* to Russia via the United States. The Department replied on March 16, 1906:

It would appear . . . abundantly clear that the immunities of diplomatic agents exist by virtue of the law of nations which is a part of the law of the land, and that such provisions [sections 4062-4065 of the Revised Statutes] are merely declarative and punitive in their nature.

But it may be said that the immunity applies merely to diplomatic agents accredited to and actually residing within the United States. To which it is replied that such a construction is narrow and literal. It would undoubtedly follow if the immunity in question depended upon the Statute in the nature of an exception, which must always be strictly construed and limited, but such construction is wholly inapplicable to a right existing anterior to and independent of the Statute in question. The law of nations must be construed broadly and in a spirit to safeguard any right existing by virtue of the law of nations. It is a separate system of jurisprudence although incorporated bodily in our fundamental law. It must therefore be construed with regard to the origin and nature of the right, irrespective of a provision that provides means for the punishment of its violation.

Now the reason of the immunity has been shown to arise from the necessity of mutual intercourse and it follows that rights and privileges necessary and proper to the enjoyment of the right and privilege must coexist in the right and flow from its existence.

If a diplomatic agent is privileged to enter and to leave an accrediting state, it follows that he must not be debarred the right of returning from his post by the act of a neighboring and friendly state. Otherwise the delay and inconvenience involved might seriously hamper the agent in discharging his duty to the home government and a return by a reasonable and proper route although it lie through a neutral territory is at times necessary, as in the case of such a country as Switzerland for example, and at all times convenient.

If there is little law on the question that is due rather to a uniform practice than to any doubt as to the existence of the right or privilege in question. Comity is the basis of much of International Law and custom is the very life of the common law of nations. Convenience, especially if it be international, is a firm basis for comity and passage through neutral territory is certainly convenient.

In support of the contention that foreign diplomatic officers are not exempt from the head tax, an opinion of the Attorney General, dated February 20, 1905, is submitted.

It is not the intention of this Department to impugn or to criticize this opinion; it is however, suggested that the opinion considers solely the letter of the Statute and does not take into consideration the fact that international law is as much the law of

the land as is a Statute. Nor is the Statute interpreted in relation to International Law, as is the rule of construction in such cases.

And it should be observed that the law of nations should not be repealed or modified by implication and it is submitted that a mere omission from a statute of a right or privilege does not repeal a right or privilege based upon International Law. Otherwise the privileges of ambassadors might be impugned as there is no saving clause in the section of the act in question. The provision of the act should be specific and inconsistent with the right or privilege conferred by International Law and if the law in question be construed with International Law it will be seen that an exception does and should exist in the case of diplomatic agents. Had the attention of the Attorney General been called to the fact that diplomatic immunity does not rest upon the wording of any statute, but is independent thereof, except as to punishment of a violation of such immunity, he would doubtless have held that the question of immunity was untouched by the Statute and not necessarily involved in it.

25 Op. Att. Gen. 370 (1906) ; the Secretary of State (Root) to the Secretary of Commerce and Labor (Metcalf), Mar. 16, 1906, MS. Department of State, 288 Domestic Letters 554, 559-560, 563-564.

On Mar. 26, 1906 the Department of Commerce and Labor transmitted to the Department of State a circular which was about to be issued to the officers of the Immigration Service, stating that the provisions of section 1 of the immigration law approved Mar. 3, 1903 in respect to the head tax did not apply to the diplomatic and consular officers of foreign governments entering the United States across the land boundaries from foreign contiguous countries, whether they were accredited to the United States or to some other country. Mr. Metcalf to Mr. Root, Mar. 26, 1906, MS. Department of State, Miscellaneous Letters, Mar. 1906, pt. V.

Respecting diplomatic officers of foreign governments accredited near the Government of Panama you are informed that a review of the authorities on international law has failed to reveal a satisfactory definition of their status in the territory of the Canal Zone. It would seem, however that their status might be regarded as analogous to that of a diplomatic envoy traveling through the territory of a third state en route to his post. In the latter case, since the institution of legation is a necessary one for the intercourse of states and is firmly established by international law, there ought to be no doubt whatever that such a third state must grant the right of innocent passage (*jus transitus innocui*) to the envoy, provided that it is not at war with the sending or receiving state. The United States asserts that, according to the law of nations a diplomatic officer is entitled to a right of transit to his post by sea, or through the national domain, whether land or water, of a state other than that to which he is accredited. It is not contended, however, that this right embraces one of sojourn in such state, or that the sovereign thereof may not prescribe the route of transit. While evidence is wanting that states generally have as yet agreed to yield rights of jurisdiction over diplomatic officers not accredited to them and passing through their terri-

tories, it is not unreasonable to claim for such individuals freedom from petty annoyance whether in the form of criminal prosecution for minor offenses or of civil suits of trivial importance.

The Secretary of State (Hughes) to the Minister to Panama (South), no. 181, Apr. 29, 1924, MS. Department of State, file 702.0011f/10; 1925 For. Rel., vol. II, pp. 653, 654.

Extent of immunity

While the American Minister to Costa Rica, Nicaragua, and El Salvador was waiting at Corinto in 1907 to take a ship to Puntarenas an American vessel arrived, and the Nicaraguan Minister of War went on board and demanded to see the manifest, stating that he was informed that there were arms on board for Honduras. The captain replied that the manifest was in a sealed envelop in the ship's safe and that he had no knowledge of its contents. As he could obtain no information the Minister of War left and the American Minister promptly transferred his baggage to the steamer and hoisted the "Legation flag", advising the captain that he "should not permit a search of the steamer, which had left Panama when Honduras and Nicaragua were at peace". No effort was made to search the steamer. With respect to the action of the Minister in going on board, hoisting the "Legation flag", and making the ship his Legation *pro tem*, the Department of State observed:

As no actual effort appears to have been made to search the steamer, it does not seem necessary at present to comment on the incident further than to remark that the right of Legation while recognized in some instances for the vehicle in which a minister and his belongings are transported, has not so far as the Department is aware, been claimed to cover the ship on which a minister may be a passenger and to operate to convert the vessel, cargo, passengers and crew of whatever nationality into the official belongings and personnel of a legation. Diplomatic immunity necessarily attaches to an envoy's person, household and property, as well as to the archives and public property of the Government he represents, for the specific purpose of securing inviolability for all that pertains to the conduct of the mission. As a converse proposition, the separation of the mission proper from all commercial and municipal ventures is proper and necessary. Had any question arisen, the Department might have found embarrassment in upholding your position and making it clear (to state a hypothetical example) that a ship carrying an envoy as a passenger, would enjoy extraterritorial immunity any more than a public hotel in which an envoy might have a night's lodging.

Minister Merry to Secretary Root, no. 1242, Feb. 23, 1907, and Mr. Root to Mr. Merry, Mar. 23, 1907, MS. Department of State, file 5040.

The Austro-Hungarian Government, on November 9, 1916, announced the appointment of Count Tarnowski as its Ambassador at

Washington. The Department of State, on November 14, instructed the American Embassies in London and Paris that the appointed Ambassador and his suite would embark for the United States on a vessel of the Holland-America Line at Rotterdam and that the Austro-Hungarian Government requested that safe-conducts be procured from the British and French Governments. Both Governments at first refused on the ground that Austro-Hungarian Embassies in neutral countries had engaged in activities outside of their diplomatic functions. The Department instructed the Embassies in London and Paris to inform the Foreign Offices that it was surprised to learn of the refusal, that the Government of the United States had an undisputed right to maintain diplomatic relations through accredited representatives with any nation, and that it could not believe that the British and French Governments intended to interfere with the exercise of this sovereign right. It said that it expected those Governments to reconsider their action and to assure Count Tarnowski and his suite that they would be unmolested in their passage to this country. The British Foreign Office replied on December 15 that, since the Government of the United States had now applied in its own name for the safe-conduct, it would be granted. The French Government, on December 18, indicated that it would take similar action.

Safe-conduct
in time
of war

The Secretary of State (Lansing) to the Ambassador to Great Britain (Page), telegram 4044, Nov. 14, 1916, MS. Department of State, file 701.6311/229; Mr. Page to Mr. Lansing, telegram 5218, Nov. 27, 1916, *ibid.* /233; the Ambassador to France (Sharp) to Mr. Lansing, telegram 1712, Nov. 27, 1916, *ibid.* /234; Mr. Lansing to Mr. Page, telegram 4097, Nov. 28, 1916, *ibid.* /233; Mr. Page to Mr. Lansing, telegram 5321, Dec. 15, 1916, *ibid.* /250; Mr. Sharp to Mr. Lansing, telegram 1749, Dec. 18, 1916, *ibid.* /251; 1916 For. Rel. Supp. 802-806.

After the severance of diplomatic relations between the United States and Germany in February 1917, arrangements were made for the departure from the United States of the German Ambassador and his wife, the Embassy staff, and all the German Consuls in the United States on a Scandinavian steamer. Permits were secured from the French and British Governments for the safe-conduct of the party from New York to Christiania.

Safe-conduct
after
severance
of relations

Secretary Lansing to the Ambassador to Spain (Willard), telegram 213, Feb. 5, 1917, MS. Department of State, file 701.6211/406a; the Ambassador to France (Sharp) to Mr. Lansing, telegram 1854, Feb. 7, 1917, *ibid.* /408; the Ambassador to Great Britain (Page) to Mr. Lansing, telegram 5643, Feb. 8, 1917, *ibid.* /410; 1917 For. Rel., Supp. 1, pp. 591, 592, 593.

The Swiss Minister in Washington in Apr. 1917 transmitted to the Department of State a communication from the Imperial German Foreign Office regarding the treatment to which the German Ambassador and his party were alleged to have been subjected by officials at Halifax, Nova Scotia.

The Department replied that after their departure from the territorial waters of the United States the German Ambassador and his party "were travelling under safe-conducts granted by the British and French Governments, and that consequently any complaint by the German Government arising from the treatment of those persons after such departure should be made to the British and French Governments and not to the Government of the United States". Secretary Lansing to Minister Ritter, no. 460, Apr. 30, 1917, MS. Department of State, file 701.6211/432; 1917 For. Rel., Supp. 1, p. 594.

After diplomatic relations had been broken off between the United States and Germany in Feb. 1917, the German Foreign Office informed the American Ambassador in Germany that he and his staff would not be permitted to leave Germany until definite information was received regarding arrangements made for the departure of the German Ambassador and his staff from the United States. The Government of the United States expressed surprise at the attitude of the German Government and informed the departing American Ambassador through the American Ambassador in Spain that complete arrangements had been made for the departure of the German Ambassador and his wife, the Embassy staff, and all German Consuls in the United States. Ambassador Gerard to Secretary Lansing, telegram 5002, Feb. 5, 1917, MS. Department of State, file 124.62/21; Mr. Lansing to Ambassador Willard, telegram 222, Feb. 6, 1917, *ibid.* 701.6211/413a; 1917 For. Rel., Supp. 1, p. 587.

Upon the departure of the former German Minister to Brazil from that country in Apr. 1917, instructions were issued to the American naval forces not to molest him and his suite during their voyage. Upon learning that the Minister would proceed to Germany via the United States on a Dutch vessel, the Department of State instructed the American Ambassador in Argentina, where the Minister had proceeded from Brazil, to grant a safe-conduct to him and the persons accompanying him. The Department also instructed the American Ambassador in Brazil to issue a safe-conduct to other members of the former German Minister's official party embarking at Rio de Janeiro, saying that the right of search was reserved by the American authorities. Secretary Lansing to the Chargé d'Affaires in Brazil (Benson), telegram of Apr. 14, 1917, MS. Department of State, file 701.6232/3; Mr. Lansing to the Ambassador to Argentina (Stimson), telegram of June 2, 1917, *ibid.* /8; Mr. Lansing to the Ambassador to Brazil (Morgan), telegram of June 6, 1917, *ibid.* /10; 1917 For. Rel., Supp. 1, pp. 607, 608.

Right of search

In authorizing the American Legation at Guatemala, in May 1917, to issue a safe-conduct for passage through the United States to the former German Minister to Guatemala, the Department of State said that the Government of the United States reserved the right of search.

Secretary Lansing to the Legation in Guatemala, telegram of May 2, 1917, MS. Department of State, file 800.111/571a.

British officers at Halifax seized certain funds in the possession of Countess Matuschka while she was returning to Germany in 1917 in the party of Count von Bernstorff, the former German Ambassador to the United States. Inquiry was made of the Department of State as to whether the reservation as to the right of search made by the British Government in granting a safe-conduct to Count von Bernstorff and his party, gave it the right to seize the funds. The Department replied that it appeared that

the reservation of the right of search included the right to seize articles declared contraband of war. The Second Assistant Secretary of State (Adee) to the Detroit Trust Company, Jan. 30, 1919, MS. Department of State, file 701.6211/464.

The Swiss Legation, in charge of German interests in the United States, informed the Department of State in 1918 that Mr. Gipperich, attaché of the German Legation at The Hague, had left three suitcases containing personal property at the Swiss Consulate in San Francisco when he was traveling through the United States on his way from China to Europe in April 1917. The Swiss Legation inquired whether the suitcases could be shipped to Mr. Gipperich at The Hague. The Department replied on January 31, 1919 that before a definite answer could be made to the Legation's inquiry it would be necessary to obtain an inventory of the contents of the suitcases and that the Department of Justice would have one of its representatives call at the Swiss Consulate to make the inventory. The Legation wrote to the Department on February 6 that, since the Swiss Consul in San Francisco was not familiar with the contents of the suitcases, it did not feel authorized to give instructions for their opening without first having obtained permission from the Swiss Government. Subsequently, the Legation informed the Department that it was advised by the Swiss Foreign Office that Mr. Gipperich did not object to an examination of the baggage by the Government of the United States. On May 26 the Department sent to the Legation a War Trade Board license giving permission to it to forward to Mr. Gipperich the three suitcases, which had been examined by a representative of the Department of Justice. Baggage

The Swiss Chargé d'Affaires ad interim (Jenny) to the Department of State, Oct. 16, 1918, and the Acting Secretary of State to the Swiss Minister (Sulzer), Jan. 31, 1919, MS. Department of State, file 701.6256/4; the Swiss Minister (Jenny) to the Acting Secretary of State, Feb. 6 and Mar. 21, 1919, *ibid.* /6 and /8; the Acting Secretary of State to Dr. Jenny, May 26, 1919, *ibid.* /12.

In an *aide-mémoire* of December 23, 1939 the British Foreign Office requested the American Embassy in Berlin, in charge of British interests in Germany, to state to the German Government that the practice of the British Government was to refrain from removing from neutral ships or detaining the following categories of persons:

(A) Heads of diplomatic missions accredited to neutral states, their families or domestic servants accompanying them. (B) Diplomatic or Commercial Counselors, Secretaries and Attaches. (C) Naval, Military and Air Attaches or Assistant Attaches. (D) Career Archivists (chanceliers). (E) Career consuls general, consuls and vice consuls. (F) And wives of officials specified in (B) to (E).

The Counselor of the American Embassy in London (Johnson) to the Secretary of State (Hull), telegram of Dec. 24, 1939, MS. Department of State, file 702.4162/67.

In an *aide-mémoire* of Dec. 25, 1939 the British Foreign Office stated that its existing practice would be maintained so long as the German authorities accorded reciprocal treatment to similar categories of British subjects. Mr. Johnson to Mr. Hull, telegram of Dec. 25, 1939, *ibid.* /68.

RESIDENCE AT CAPITAL

§389

In April 1925 the German Foreign Office informed the American Embassy that Mr. Squire, trade commissioner of the United States with headquarters at Hamburg, under the supervision of the commercial attaché at Berlin, was defendant in a suit in Hamburg in which he claimed immunity. The Embassy was asked to persuade Mr. Squire to withdraw this plea on the ground that the rights of immunity could only be extended to him if he performed his duties in the same place in which the Embassy was situated. The Department instructed the Embassy that, while it did not desire to urge that Mr. Squire, who was merely attached to the office of the commercial attaché, was entitled to diplomatic immunities, it did not consider that such immunities, if they otherwise existed, should be denied solely on the ground that he did not reside in Berlin. The attention of the Foreign Office might be called, it was said, to the fact that the Diplomatic List of the Department of State in 1922-24 included the name of a German financial attaché, although he resided in the city of New York.

Chargé Robbins to Secretary Kellogg, no. 1103, May 1, 1925, MS. Department of State, file 701.05/117; Mr. Kellogg to the Embassy in Berlin, telegram 121, June 19, 1925, *ibid.* /118.

The Spanish Ambassador informed the Department of State, in March 1927, that his Government had appointed the Marques de Villa Alcazar to be honorary agronomy attaché of the Embassy. The Department replied that, since the Marques intended to reside in San Francisco, it could not grant him diplomatic status as a member of the Embassy staff in view of its recently adopted decision to confine the granting of such status in the future to persons residing in Washington.

Secretary Kellogg to the Spanish Ambassador, Señor Don Alejandro Padilla y Bell, June 17, 1927, MS. Department of State, file 701.5211/250. See, to the same effect, the Acting Secretary of State (Phillips) to the Ecuadoran Minister (Zaldumbide), July 12, 1933, *ibid.* 701.2211/199; the Assistant Secretary of State (Welles) to the Chargé d'Affaires ad interim of Costa Rica (Gonzalez-Zeledón), Jan. 3, 1934, *ibid.* 701.1811/184.

. . . In view of the importance of New York City as a financial and commercial center, the Department has raised no objection to the maintenance in New York City of offices for the commercial or financial attachés or counselors. With regard to the individual concerned, however, the Department has made it a strict rule not to include in the *Diplomatic List* the names of foreign diplomatic representatives giving a residential address outside of Washington or its immediate vicinity. If the names of the commercial or financial attachés referred to above are carried on the *Diplomatic List*, they must either give a Washington residential address or no address at all. It is pertinent to state, however, that the Department does not encourage the establishment of such offices in New York City.

Commercial
and financial
attachés

The Assistant Secretary of State (Messersmith) to the Chargé d'Affaires ad interim in the Union of South Africa (Russell), no. 320, Sept. 28, 1937, MS. Department of State, file 701.0011/267. See also the Assistant Secretary of State (Berle) to the Brazilian Chargé d'Affaires ad interim (De Sousa Leão), Aug. 31, 1938, MS. Department of State, file 701.3211/538.

See also §379, *ante*, on "Union of Consular and Diplomatic Functions".

INSTRUCTIONS

§390

In 1908 the Minister to Rumania signed certain conventions with that country which the Department of State informed him departed so greatly from the instruments which he was authorized to sign as to make them valueless. After reviewing its instructions to the Minister, the Department said that it was requested by the President to say to him that he was deserving of censure for a violation of instructions in the case of both conventions: in signing one of them without any authority whatsoever and in the face of wholly inconsistent instructions from the Department, and in obtaining full powers to sign the other under certain representations and then using the powers to sign a wholly different document without any communication to the Department regarding the departure from the form which he was instructed to follow and which he represented would be followed. Both instruments, it was said, were disapproved and neither would be submitted to the Senate.

Secretary Root to the Minister to Rumania, no. 58, June 17, 1908, MS. Department of State, file 12171/6-8.

SUPPORT OF PRIVATE INTERESTS

§391

An American firm in Stockholm requested the Minister to Sweden to address letters to the appropriate Swedish authorities to assist it in obtaining the official designation as purveyor to the Swedish Court. The Department of State approved the action of the Minister in refusing to comply with the request.

Assistant Secretary Castle to Minister Morehead, no. 27, Sept. 10, 1930, MS. Department of State, file 163 Texas Co., Ltd.

The American Minister to Siam was instructed in 1909 that it would not be advisable, in view of his diplomatic privileges and immunities, for him to act as an executor under a will, as he had been asked to do by a British court in the case of a deceased British subject.

Acting Secretary Wilson to Minister Kiug, telegram of Nov. 4, 1909, MS. Department of State, file 22160; 1909 For. Rel. 541.

Section 7 of the act of Congress approved February 5, 1915 provides:

That no ambassador, minister, minister resident, diplomatic agent, or secretary in the Diplomatic Service of any grade or class shall, while he holds his office, be interested in or transact any business as a merchant, factor, broker, or other trader, or as an agent for any such person to, from, or within the country or countries to which he or the chief of his mission, as the case may be, is accredited, either in his own name or in the name or through the agency of any other person, nor shall he, in such country or countries, practice as a lawyer for compensation or be interested in the fees or compensation of any lawyer so practicing.

38 Stat. 805, 807.

The Military Intelligence Division of the War Department instructed all military attachés that it was the opinion of that Department "that military attachés and language officers, who have received designations from the Secretary of State as attachés to American Diplomatic Missions abroad, are covered by the intent of the above quoted law and that their conduct should be governed accordingly". The Secretary of War (Weeks) to the Secretary of State (Hughes), Aug. 12, 1924, MS. Department of State, file 12154 China/14.

Chapter I, section 19, of the Foreign Service Regulations of the United States provides (Jan. 1941):

"Officers of the Foreign Service are forbidden to transact, engage in, or have any interest in any business to, from, or within the limits of their respective jurisdictions, either in their own names or in the names or through the agency of any other persons.

"Officers of the Foreign Service are also forbidden to make any investments of money within the limits of the foreign country to which the officers are accredited or assigned. This prohibition shall apply to the owning of

real estate, bonds, shares, stocks, and mortgages, but does not extend to the purchase of a house and land for personal use. (Feb. 5, 1915, and Apr. 5, 1906; 38 Stat. 807, 34 Stat. 101; 22 U.S.C. §§38, 106.)

"(Ex. Or. 8396, Apr. 18, 1910.)"

The Department of State instructed the Legation in Persia in 1921 that it was strongly opposed to the engaging in business by Legation clerks and that a clerk in the Legation should therefore be instructed to desist from private financial transactions while connected with the Legation.

Secretary Hughes to the Legation at Teheran, telegram 16, May 25, 1921, MS. Department of State, file 124.913/32.

Upon being informed that an American citizen had recently delivered four trunks to the American Embassy in Madrid for safekeeping, the Department of State, in September 1936, said that neither it nor the Embassy could assume responsibility for personal property left at the Embassy.

Safekeeping
of property

Secretary Hull to Helen G. Chacon, telegram of Sept. 3, 1936, MS. Department of State, file 199.3/845.

An American citizen in Mexico wrote to Charles B. Parker, acting in representation of American interests in that country, in 1916, and stated that Americans had been urged to leave Mexico and to turn over all their effects and affairs to the nearest consular agent with the assurance that the Government of the United States would see that their losses were subsequently made good. He expressed the hope that the United States would reimburse him for the loss of certain jewelry. The Department of State informed Mr. Parker that the writer was apparently under a misapprehension. It added:

"... When American diplomatic or consular officers accept the custody of property belonging to American citizens residing in foreign countries, they do so with the understanding that neither they nor the Department assume any responsibility in the matter."

Mr. Parker was instructed to inform the writer in this sense. The Second Assistant Secretary of State (Adee) to Charles B. Parker, no. 1988, Oct. 6, 1916, MS. Department of State, file 125.827/7.

NOTARIAL POWERS

§392

The Foreign Service Regulations of the United States provide (Jan. 1941):

X-5. *Notarial services.* In the absence of statutory enactment on the subject, diplomatic officers, except ambassadors and ministers, may, and consular officers shall, perform within the confines of their districts such notarial acts as a notary public is authorized to perform under the general law and according to

the usage of nations, provided a request is made for such services or their performance is deemed necessary.

When statutes governing the performance of such acts have been enacted by the Federal or State Governments, officers shall be guided by the terms of the applicable statute.

(Ex. Or. No. 8292, Nov. 30, 1939.)

Note 2. *Authority of officers of Foreign Service to perform notarial acts under Federal laws.* Ambassadors and ministers have no authority under Federal law to perform notarial services, except in connection with the authentication of extradition papers.

Other diplomatic officers and all consular officers are authorized to administer or to take from any person an oath, affirmation, affidavit, or deposition, and to perform any notarial act which any notary public is required or authorized by law to do within the United States. (22 U.S.C. §§98, 131.)

Note 3. *Legal effect of notarial services performed by officers of the Foreign Service.* Notarial services authorized in note 2 of this section shall, when certified under the hand and seal of office of the executing officer, be valid and of like force and effect as if performed by any duly authorized and competent person within the United States. Any documents, purporting to have affixed, impressed, or subscribed thereto or thereon, the seal and signature of the officer administering or taking the same in testimony thereof, shall be admitted in evidence without proof of any such seal or signature being genuine or of the official character of such person. (22 U.S.C. §131.)

The validity given by statute to such notarial acts extends only to matters exclusively within the province of the Federal Government. (33 Fed. 572.)

Note 4. *Authority of officers of the Foreign Service to perform notarial acts under State or Territorial laws.* Ambassadors and ministers may perform notarial services for use within a State or Territory *only* in those instances where the State or Territory requires that the documents for use in its courts be certified by an ambassador or minister. The requesting authority should, in such cases, be informed that an ambassador or minister has no authority under Federal laws to perform notarial services.

In the absence of a statutory enactment by a State or a Territory on the subject, other diplomatic and consular officers have authority to perform such services as are within the powers of a notary public according to general law and commercial usage. In such cases, the person requesting or requiring the service shall be informed, preferably in writing, of the absence of specific authorization for the officer to perform the service in order that the officer may be relieved of responsibility in the event the notarial act is subsequently rejected or refused recognition under the State or Territorial law.

Secretaries
of embassy

Replying to an inquiry as to the capacity of a secretary of embassy to acknowledge a power of attorney, the Department of State, after

referring to section 1750 of the Revised Statutes, providing for the administration of oaths, etc., and the performance of notarial acts by secretaries of legation and consular officers, expressed the opinion "that a secretary of embassy comes within the language of this section and has the notarial powers conferred by the section upon a secretary of legation".

The Assistant Secretary of State (Wilson) to Messrs. A. Levi and Company, Mar. 15, 1909, MS. Department of State, file 18160/-. Reference was made to *United States v. Badeau*, 38 Fed. 572 (S.D.N.Y., 1886).

As to the lack of authority to perform notarial acts on the part of American diplomatic officers present in but not accredited to a foreign country, see *ante* §374.

In 1921 the Department of State said that secretaries of embassies are authorized by the United States statutes to administer oaths and perform notarial acts and that it was presumed that they would be included in the clause "persons exercising public ministerial functions" in a Pennsylvania statute providing for acknowledgments before such persons. The Second Assistant Secretary of State (Adee) to Messrs. McVicar, Hazlett, Gardner and Gannon, July 5, 1921, MS. Department of State, file 193.5/46.

The Minister to Sweden was instructed in 1906 that the statutes of the United States contained no authority for a minister to act as a notarial officer; that he should not do so except when authorized by statute; and that any unauthorized act of such a character might be deemed to be illegal and void if the question of its validity were brought before a court. He was subsequently instructed, however, that, since the certification of an act performed by the Swedish Foreign Office did not involve a notarial act in the sense of the United States statute (Rev. Stat., sec. 1750), the Department of State had no objection to his subscribing to a certificate of that kind.

Certification
by minister
of act of
foreign office

Acting Secretary Adee to Minister Graves, no. 387, Sept. 14, 1906, MS. Department of State, file 588; Acting Secretary Bacon to Mr. Graves, no. 88, Dec. 7, 1907, *ibid.* /2-3.

The American Minister to Portugal, in 1929, requested permission, in the absence of the Legation's Secretary and Vice Consul, to certify the new oath of office of the Consul General in Lisbon, who had been promoted from Class III to Class II in the Foreign Service. The Department replied that ministers were not authorized to administer oaths, that the Consul General's promotion was already effective, and that he might take the oath when the Secretary and Vice Consul returned.

Secretary Stimson to the Legation at Lisbon, telegram of May 29, 1929, MS. Department of State, file 123L51/195.

A law of 1907 of Panama provided for the allotment of certain "waste lands" to persons domiciled in that country but stipulated

Certification
of laws

that foreigners who were natives of countries where Panamanians were not permitted to own city or country property were not eligible to receive such allotments. The Panamanian Commissioner of National Lands ruled that he would not issue certificates of title to a foreigner until the applicant had filed a certificate from his diplomatic representative that, in the country of which he was a native, Panamanians were permitted to own property. The Chargé d'Affaires ad interim in Panama was instructed by the Department of State, in 1909, that it was deemed best that he should make no such certifications as to specific laws or statutes of a State or of the United States. The Panamanian Secretary of State for Foreign Affairs subsequently indicated his willingness, in the case of the application of an American firm incorporated in Massachusetts, to accept a certificate issued by the proper certifying officer of that State, presumably without having it authenticated by the Department or the Legation. In 1910 the Department reiterated the conclusion that "American Diplomatic officers are not officially competent to certify to the specific law of a State or of the United States."

Chargé Weitzel to Secretary Knox, no. 547, Aug. 27, 1909, and Mr. Knox to Mr. Weitzel, no. 212, Nov. 1, 1909, MS. Department of State, file 21419; Mr. Weitzel to Mr. Knox, no. 594, Nov. 24, 1909, *ibid.* /6; Mr. Wilson to H. H. Lee, July 18, 1910, *ibid.* 819.5211/7.

NON-INTERFERENCE IN POLITICS

§393

Chapter I, section 15, of the Foreign Service Regulations of the United States provides (Jan. 1941):

Officers of the Foreign Service shall not participate in any manner in political matters of the country to which they are accredited or assigned. They shall also refrain from expressing harsh or disagreeable opinions upon local political questions or other controversial subjects.

Ex. Or. 8306, Apr. 18, 1940.

The Secretary of State wrote informally to an Ambassador in Washington on September 28, 1914 that the President of the United States was much annoyed over an interview published in a local newspaper on September 23 which was purported to have been given by a Secretary of the Embassy, relating to the unfriendly public opinion in Japan for the United States. The Secretary said that, although the Secretary of the Embassy had publicly denied that the interview

was correct, he had admitted that he had made some statement to the reporter in regard to this subject. The Secretary added:

However disposed the President is to recognize the liability of error in a newspaper report of an oral statement, he cannot but feel that a statement at any time by a diplomatic officer of a foreign government, as to the relations of the United States with another Power, is indiscreet and improper. A statement on such a subject at the present time, when the United States is seeking to preserve a strict neutrality, if it tends to influence American public opinion against one of the belligerents in the war which is being waged, is especially mischievous and arouses suspicion as to the motive which inspired it.

He added that he regretted being compelled to call this matter to the Ambassador's attention and had done so in an informal way so that he might take the first convenient opportunity to call at the Department and discuss the propriety of the Secretary's conduct. The Ambassador replied on September 29 that he agreed with the Secretary of State as to the impropriety of the language of the alleged interview but that, since the Secretary of the Embassy had assured him that he had not made the statements therein contained, he had published a denial in all newspapers. He requested the Secretary of State to bring his reply to the attention of the President.

MS. Department of State, file 701.6211/280 ½ A, /281 ½.

The Department of State inquired of a foreign minister in Washington in 1920 as to his procedure in calling upon a member of the Foreign Relations Committee of the United States Senate for the apparent purpose of providing the Committee with certain information already requested of the Department in a resolution introduced in the Senate. The Minister gave a very frank statement of what had taken place at the interview and stated that his procedure was due to his unfamiliarity with the established custom of the Government of the United States and that no similar occurrence would take place in the future.

MS. Department of State, file 701.1411/104.

On July 20, 1908 the Venezuelan Minister of Foreign Affairs informed the Minister Resident of the Netherlands that the Supreme Magistrate of Venezuela had directed him to hand him his passports, in view of a letter (apparently criticizing the political and commercial situation in Venezuela) addressed by him to a commercial union in Amsterdam and published in the Netherlands.

John Brewer (custodian of Legation property) to the Secretary of State, July 25, 1908, MS. Department of State, file 14457/8-11; 1909 For. Rel. 630.

A resolution adopted at Habana in 1940 at the Second Meeting of the Ministers of Foreign Affairs of the American Republics recited that the convention on diplomatic officers, signed at Habana on February 20, 1928, established the following principles:

a) Foreign diplomatic officers shall not participate in the domestic or foreign politics of the State in which they exercise their functions.

b) They must exercise their functions without coming into conflict with the laws of the country to which they are accredited.

c) They should not claim immunities which are not essential to the fulfillment of their official duties.

d) No State shall accredit its diplomatic officers to other States without previous agreement with the latter.

e) States may decline to receive a diplomatic officer from another, or, having already accepted him, may request his recall without being obliged to state the reasons for such a decision.

It was accordingly resolved:

To urge the Governments of the American Republics to prevent, within the provisions of international law, political activities of foreign diplomatic or consular agents, within the territory to which they are accredited, which may endanger the peace and the democratic tradition of America.

Department of State, *III Bulletin*, no. 61, p. 130 (Aug. 24, 1940); *ibid.*, no. 62, p. 178 (Aug. 31, 1940).

SPEECHES

§394

In a circular instruction to diplomatic and consular officers of July 24, 1937 the Secretary of State referred to section XV-2 of the Instructions to Diplomatic Officers of the United States and to section 435 and the note to section 438 of the Consular Regulations, and requested that copies of all addresses delivered by diplomatic or consular officers of the United States be transmitted immediately after delivery to the Department of State. He further requested that, whenever an Ambassador or Minister of the United States felt it desirable to deliver an address relating in any part to the foreign policy of the Government of the United States or to the foreign policies of other governments, such portions of the intended address be transmitted to the Department before delivery.

Secretary Hull to diplomatic and consular officers, July 24, 1937, diplomatic serial 2817, MS. Department of State, file 120.39/169A.

Chapter I, section 14, of the Foreign Service Regulations of the United States provides (Jan. 1941) :

"Officers of the Foreign Service shall not allude in public speeches to disputes between governments, to active political issues in the United States or elsewhere, or to any matters pending in any Foreign Service establishment.

"(Ex. Or. 8396, Apr. 18, 1940.)"

In commenting on the remarks made by the American Minister to Bolivia at his official reception by the President of that country, the Department of State observed that he had made reference to certain features of South American international relations which still remained in the realm of conflict, the tendency of which allusions might readily be construed as implying a criticism of national politics and history. The Minister was instructed to abstain in the future, unless specially authorized, "from all public discussion of matters of international policy and relations the characterization of which by you may give rise to such construction and comment as may operate to defeat the ends of a purpose, however laudable".

Acting Secretary Wilson to Minister Knowles, no. 6, Jan. 28, 1911, MS. Department of State, file 123.K76/119.

In a statement released to the press on March 21, 1940 it was said that the Secretary of State had examined the text of an address made at Toronto on March 19, 1940 by the Minister to Canada and had found that it "contravened standing instructions to American diplomatic officers, as public discussion of controversial policies of other governments, particularly with governments engaged in war, without the prior knowledge and permission of this Government, is not in accord with such instructions". Such public statements by the diplomatic representatives of the United States, it was said, were likely to disturb the relations between this and other governments.

Department of State, II *Bulletin*, no. 39, p. 324 (Mar. 21, 1940).

PRESENTS

§395

Article I, section 9, paragraph 8, of the Constitution of the United States provides :

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

It is provided in section 115, title 5, of the United States Code as follows:

Any present, decoration, or other thing, which shall be conferred or presented by any foreign government to any officer of the United States, civil, naval, or military, shall be tendered through the Department of State, and not to the individual in person, but such present, decoration, or other thing shall not be delivered by the Department of State unless so authorized by act of Congress. (Jan. 31, 1881, c. 32, §3, 21 Stat. 604.)

Section 126, title 22, of the United States Code provides that no diplomatic or consular officer shall "ask or accept, for himself or any other person, any present, emolument, pecuniary favor, office, or title of any kind from any such [foreign] government". June 17, 1874, c. 294, 18 Stat. 77.

By Executive Order 7577 of March 19, 1937 it is provided that "American and diplomatic and consular officers are hereby prohibited from accepting in any circumstances any present, decoration, medal, order, testimonial, or other thing that may be tendered to them by any foreign king, prince, or foreign state." 2 F.R. 572. See also For. Ser. Reg. U.S. I-23, Jan. 1941; Ex. Or. 8396, Apr. 18, 1940.

"... In order to carry out the intent of the Executive Order [Mar. 19, 1937], the Department *must refuse to accept for deposit* decorations and presents conferred upon American diplomatic and consular officers by foreign governments. The wording of the Order is explicit and inflexible and will allow of no exceptions in the case of this or that country or in the case of this or that officer.

"The difficulties experienced by officers in the field in refusing to accept such awards are appreciated, but it is hoped that the clear and unmistakable provisions of the Executive Order cited above will make it possible for them, without undue embarrassment, to explain why they are not in a position to accept any decoration or present, even for deposit in the Department of State. It may be observed that, should there be reason to anticipate the offer of a decoration or present, informal notice, given in the proper quarter, of the prohibition against accepting a direct tender thereof would avoid the apparent ungraciousness of declining a courtesy.

"If a decoration or present is tendered unexpectedly at a public ceremony or in a similar situation where a flat refusal to receive it would result in great embarrassment to all concerned, it should be returned informally to the donor at the earliest possible moment. The donee may express regret that it would not be in accordance with the policy of his Government for him to accept this friendly testimonial of esteem.

"In the event that any direct inquiry is made by an official of a foreign government indicating an intention to confer a decoration or present, the policy of this Government as set forth above should be carefully explained to him. It should be made clear that under the provisions of the Executive Order of March 19, 1937, not only are American diplomatic and consular officers prohibited from accepting decorations or presents tendered them in the field, but the Department of State, under the provisions of the same Order, must also decline to accept decorations or presents for deposit on

behalf of such officers, when tendered by a foreign Embassy or Legation in Washington.

"It is further desired that the prohibition against the acceptance by American diplomatic and consular officers of decorations or presents tendered by foreign governments, as set forth in the Executive Order of March 19, 1937, shall likewise apply to all American clerks and employees in the embassies, legations and consulates."

Secretary Hull to diplomatic and consular officers, Mar. 16, 1938, diplomatic serial 2916, MS. Department of State, file 093.002/252A.

The circular instruction of Mar. 16, 1938 was not intended to apply to military attachés. Secretary Hull to the Legation at Athens, telegram 26, Feb. 20, 1939, MS. Department of State, file 093.002/261.

"Officers of the Foreign Service shall not act as transmitting agents for gifts or communications from citizens, subjects, or organizations in foreign countries to the President of the United States or to Federal, State, or municipal officials; or for gifts or communications from citizens or organizations in the United States to the heads of foreign states or other officials in foreign countries." For. Ser. Reg. U.S. I-24, Jan. 1941; Ex. Or. 8396, Apr. 18, 1940.

In March 1910 Senator Elihu Root of the Committee on Foreign Relations of the Senate reported that there were then pending in that committee two hundred requests for the consent of Congress, under article I, section 9, paragraph 8, of the Constitution, to the acceptance of gifts and decorations tendered by foreign governments to officers of the United States. After pointing out that it seemed that requests of this character should be passed upon in accordance with some declared principle of action, so that one officer should not have his request refused and another receive authority as the result of accidental circumstances attending the presentation of the request, it was stated in the report that:

The existence of the prohibition in the Constitution indicates that the presumption is against the acceptance of the present, emolument, office, or title. A habit of general and indiscriminate consent by Congress upon such applications would tend practically to nullify the constitutional provision, which is based upon an apprehension, not without foundation, that our officers may be affected in the performance of their duties by the desire to receive such recognition from other governments. A strong support for the view that the practice should not be allowed to become general is to be found in the fact that the Government of the United States does not confer decorations or titles or, unless in very exceptional cases, make presents to the officers of other governments. It is not suitable that we should permit our officers to receive courtesies which we do not reciprocate by extending similar courtesies to the officers of other governments. We are of the opinion that the following rules should be observed:

1. That no decoration should be received unless possibly when it is conferred for some exceptional, extraordinary, and highly

Rules
submitted

meritorious act, justifying beyond dispute a special mark of distinction.

2. That no presents should be received except such articles as are appropriate for souvenirs and marks of courtesy and appreciation and having an intrinsic value not disproportionate to such purpose.

3. That the acceptance of presents within the limitation above stated should be further limited to cases in which some exceptional service or special relation justifying the mark of courtesy exists between the recipient and the government offering the present.

4. That no offer of any other title or emolument or office should be considered.

5. We consider that membership in learned societies, even though the appointment thereto may have a quasi governmental origin, should not be considered as coming within the constitutional provision, and it may well be that as to certain trifling gifts, such as photographs, the rule of *de minimis lex non curat* should be deemed to apply.

S. Rept. 373, 61st Cong., 2d sess.

Continuity in office

The Russian Government conferred the diploma of the Order of St. Anne, third class, upon the Second Secretary of the American Embassy at St. Petersburg, which he accepted on February 20, 1907, his successor in office having taken the oath of office on the preceding day. He himself did not take the oath of office as Secretary of the Legation in Brussels until the following day, February 21, 1907. The Department of State instructed him as follows:

The fact that Mr. O'Shaughnessy took the oath of office as second secretary at St. Petersburg before the Consul General at Berlin on the 19th of February did not operate to vacate your office at St. Petersburg. In almost every case of transfer there is necessarily a lap[se] of time between the successor's taking oath and his relieving his predecessor. By the uniform rule of the Department in such cases you were regarded as being continuously in the public service and under the control and instructions of the Department as secretary at St. Petersburg up to the time of your departure therefrom, and thereafter as secretary at Brussels in virtue of your new oath and you were entitled to continuous pay notwithstanding that your successor had taken oath and was presumably in transit. If you have not charged the Government for your salary on the 20th of February that was a voluntary act which in no way affects the Department's authority over you on that day.

It would be difficult for the Department to admit that by any construction on your part you could, without the Department's knowledge and approval, withdraw yourself from its authority for a single day.

Under these circumstances, therefore, the Department is, under the Constitution and Statutes, unable to authorize your acceptance of the Russian decoration without the consent of Congress.

The Acting Secretary of State (Bacon) to the Secretary of the Legation in Belgium (Bliss), July 23, 1907, MS. Department of State, file 3337/5-6.

Cf. the case of Paxton Hibben who in 1906 was decorated by the Russian Government subsequent to his transfer from St. Petersburg, where he was Second Secretary of the American Embassy, to the post of Second Secretary of the Embassy at Mexico City. Hibben took an oath of office as Second Secretary at Mexico City prior to leaving St. Petersburg. He was informed in a personal letter by the Second Assistant Secretary of State that there did not appear to have been such an hiatus in his service as an officer of the United States as would warrant his acceptance of the decoration without the previous consent of Congress. The Second Assistant Secretary of State (Adee) to Paxton Hibben, Jan. 5, 1907, MS. Department of State, file 2245/6-8.

An Act of Congress approved July 9, 1918 provided that American citizens who had received since August 1, 1914 decorations or medals for distinguished service in the armies or in connection with the field services of those nations engaged in war against the Imperial German Government should, on entering the military service of the United States, be permitted to wear such medals or decorations. It also authorized all members of the military forces of the United States serving in the existing war to accept within its duration or within one year thereafter from the government of any other country engaged in war with any country with which the United States was or should be concurrently engaged in war such decorations when tendered as were conferred by such government upon the members of its own military forces. It was stated that the consent of Congress required therefor by clause 8 of section 9 of article I of the Constitution was thereby expressly granted with the proviso that any officer or enlisted man of the military forces of the United States was thereby authorized to accept and wear any medal or decoration theretofore bestowed by the government of any of the nations concurrently engaged with the United States in the existing war.

War
decorations:
act of 1918

40 Stat. 845, 872.

The Department of State inquired of the Attorney General in April 1919 whether it was justified, in view of the acts of Congress of July 31, 1881 and of July 9, 1918, in delivering to naval officers of the United States medals and decorations tendered them through it by governments of any of the countries engaged in war with any country with which the United States was likewise engaged in war and whether the term "medal or decoration" as contained in the act of July 9, 1918 covered all articles such as bowls, cups, and photographs which had been or might be tendered by such foreign governments. The Attorney General replied that he concurred in the construction by the Navy Department and the President of the United States that the provisions of the above-mentioned act applied to the naval forces of the United States. He stated further that the words "medal or decoration" in his opinion were used in the act in their usual meaning and did not include such articles as bowls, cups, and photographs. The Attorney

General (Palmer) to the Acting Secretary of State (Polk), May 9, 1919, MS. Department of State, file 093.932/47.

It is provided in section 114, title 5, of the United States Code that—

Display of
decoration

no decoration, or other thing, the acceptance of which may be authorized by consent of Congress, by any officer of the United States, from any foreign government, shall be publicly shown or exposed upon the person of the officer so receiving the same. (Jan. 31, 1881, c. 32, § 2, 21 Stat. 604.)

See also For. Ser. Reg. U.S. I-27, Jan. 1941; Ex. Or. 8396, Apr. 18, 1940.

The American Chargé d'Affaires at Madrid inquired, in 1908, whether he might wear in Madrid on full-dress occasions the plaque of the Order of Carlos III conferred on him by the Spanish Government in 1906 while he was secretary to the American Special Embassy appointed to attend the wedding of the King of Spain, the diploma of which was not signed until after he had left the service of the United States. The Department of State replied:

... you are not prohibited by law from receiving the insignia of the Order of Carlos III and ... therefore, inasmuch as the consent of Congress was not necessary in order that you might legally receive the decoration, you would not be prohibited by the strict terms of section 2 of the act of 1881 from wearing the decoration in question.

The department, however, believes that diplomatic officers of the United States should seek to observe the intentment and spirit of the prohibition rather than merely to be governed by its literal scope. This intentment seems broadly to be that no officer of the United States shall make public display of a favor bestowed upon him by a foreign government. The words "by the consent of Congress" in section 2 of the act of January 31, 1881, may be considered as merely recitative of the general condition under which an officer of the United States may be in possession of a foreign decoration, but could hardly have been intended to limit the prohibition and discriminate against an officer possessing it by consent of the Congress and in favor of one possessing such decoration without consent.

Accordingly, it appears to the department that you would exhibit questionable taste in claiming the privilege, under a limiting interpretation of the statute, to wear a decoration which you would not be at liberty to wear if possessed by virtue of the consent of Congress.

Acting Secretary Bacon to Chargé Buckler, no. 244, Dec. 17, 1908, MS. Department of State, file 4199/9; 1907 For. Rel., pt. 2, pp. 1017-1018.

In the following instances the persons concerned were permitted to receive presents or emoluments, etc., without the consent of Congress:

Professor J. A. Udden, a special assistant in the United States Geological Survey with indefinite tenure, who was paid by the day and who took no oath of office, was held not to be an "officer" of the United

States and to be entitled to receive an order from the King of Sweden. 28 Op. Att. Gen. 598 (1912).

Raymond E. Cox, a Foreign Service officer, was held entitled to receive compensation as a member of the personnel of the Tacna-Arica Plebiscitary Commission, since the Commission was not a foreign state. Memorandum of June 23, 1925, MS. Department of State, file 723.2515PC/153.

William E. Pulliam, general receiver of Dominican customs, who was appointed by the President but who received no compensation from the Government of the United States, was held not to be a person holding an office under the United States. The Assistant Secretary of State (Welles) to the Secretary of War (Dern), June 15, 1935, MS. Department of State, file 093.392/13.

Newton D. Baker, a member of the United States Territorial Expansion Memorial Commission, who was not appointed by the President to the position or by the head of a Department or by a court of law and who received no remuneration from the Federal Government for his services, was not regarded as an officer of the United States. The Acting Secretary of State (Moore) to Newton D. Baker, Jan. 9, 1937, MS. Department of State, file 093.932/151.

Dr. W. Cameron Forbes, a member of the Permanent Commission of Inquiry established by the United States and Rumania, a position carrying "no emoluments or duties", was considered not to be an officer of the United States. The Assistant Secretary of State (Carr) to Dr. Forbes, Jan. 21, 1937, MS. Department of State, file 093.932/146.

The prohibition against the acceptance of foreign decorations was held not to apply to wives of officers of the United States. The Acting Secretary of State (Welles) to the Embassy in Chile, Dec. 13, 1938, MS. Department of State, file 093.252/73.

The Captain of the *Schodack*, a merchant vessel owned by the United States, who had been appointed by the Maritime Commission, was not considered an officer of the United States. The Assistant Secretary of State (Messersmith) to Rear Admiral Land, Mar. 9, 1939, MS. Department of State, file 093.573 Smaragd/19.

In the following instances the persons concerned were not permitted to receive presents or emoluments, etc., without the consent of Congress:

A former Minister to Venezuela (Russell), who was "under orders from the Secretary of State" (a status which appeared to be equivalent to an extension of leave without pay) following the closing of the Legation in Venezuela and who was subsequently designated Commissioner on the part of the United States to the Exposition at Quito, Ecuador, was considered to be an officer of the United States during the interim. The Acting Secretary of State (Adee) to the French Chargé d'Affaires (Des Portes de la Fosse), Sept. 19, 1908, MS. Department of State, file 2143/19.

Captain N. M. Brooks, a clerk of class 4 in the Post Office Department, who held his appointment from the head of that Department and who received a fixed compensation and performed regularly prescribed services, was held to be an officer of the United States. 27 Op. Att. Gen. 219, 220-221 (1909).

John Brewer, a clerk in the American Legation in Venezuela, who was in charge of its archives in 1908-9 during the suspension of diplomatic

relations between the United States and Venezuela and who up to that time was also American Consular Agent, holding the latter position under an appointment made by the Secretary of State, was held to be an officer of the United States. The Secretary of State (Knox) to the Minister to Venezuela (Russell), May 3, 1909, MS. Department of State, file 18788/-.

Clem J. Richards, a member of the George Rogers Clark Sesqui-centennial Commission of the United States, who received his appointment from the Commission and who was a disbursing officer for it under a bond given to the United States for the faithful performance of his duties, was considered to be a person holding an office of trust under the United States. The Assistant Secretary of State (Wilson) to Clem J. Richards, Oct. 29, 1937, MS. Department of State, file 093.852/663.

The regulations of the Department of State "prohibit retired Foreign Service officers, as well as those on active duty, from accepting honors from foreign Governments". The Acting Chief of the Division of Western European Affairs (Boal) to Jules Henry, Aug. 20, 1929, MS. Department of State, file 093.512/222. To the same effect, see the Acting Secretary of State (Carr) to D. I. Murphy, June 27, 1925, *ibid.* 093.411/111; the Assistant Secretary of State (Wright) to Frederick Ogden De Billier, Mar. 8, 1927, *ibid.* 093.255/1; Secretary Hull to the American Legation in Paraguay, telegram 2, Feb. 9, 1940, *ibid.* 093.342/6. See also sections 18(b), 18(m), and 19 of the act of Congress approved May 24, 1924. 43 Stat. 140.

A retired civil-service employee, Dr. Charles F. Marvin, who had been Chief of the Weather Bureau at Washington, was by his retirement held to have ceased to be an officer of the United States within the meaning of article 1, section 9, of the Constitution. However, the consent of Congress was obtained to his receiving a decoration from the King of Norway, in view of the fact that a joint resolution of June 27, 1934 (48 Stat. 1267) required the Department to submit a list of retired officers for whom it was holding decorations. By a joint resolution approved July 8, 1937 Dr. Marvin was authorized to accept the insignia and diploma in question. 50 Stat. 1025. The Assistant Secretary of State (Wright) to the Norwegian Minister (Bryn), Feb. 16, 1926, MS. Department of State, file 093.572 Marvin, Charles F./-; memorandum of the Legal Adviser, Apr. 2, 1937, *ibid.* /15.

In 1908 the Department of State informed Major General George W. Davis, United States Army, retired, who had been appointed Envoy Extraordinary and Minister Plenipotentiary of the United States on Special Mission to represent the Government of the United States at the formal opening of the Interoceanic Railway of Guatemala, that as an officer on the retired list of the Army he was an officer of the United States and that a gold medal tendered for him should be deposited with the Department to await the action of Congress. The Acting Secretary of State (Adee) to Major General Davis, Sept. 19, 1908, MS. Department of State, file 10793/43.

"Under section 2, National Defense Act, 'the officers and enlisted men on the retired list' are a part of the Regular Army" and under the Constitution may not accept decorations from foreign governments without Congressional authority after the expiration of the time provided in the act of July 9, 1918, having to do with the acceptance within a limited period of decorations from Allied nations. 40 Stat. 872. Opinion of the

Judge Advocate General, Apr. 18, 1923, *Digest of Opinions of the Judge Advocate General of the Army, 1912-1930* (1932) §365.

On Feb. 1, 1935 the War Department informed the Secretary of State that Brigadier General Nathorst, a retired officer of the Philippine constabulary who enjoyed a life pension and was liable for active service, held an office of profit or trust in the Philippine Islands and as such was prohibited under the terms of the Organic Act of the Philippine Islands (Aug. 29, 1916, 39 Stat. 545, 546) from accepting a decoration without the consent of Congress. The Secretary of State agreed with the conclusion. The Assistant Chief of the Division of Protocol and Conferences (Holmes) to Brigadier General Nathorst, Feb. 14, 1935, MS. Department of State, file 093.51G2/23.

Major Horace Morison, a member of the Quartermaster Officers' Reserve Corps, was held by the War Department to occupy a position of profit or trust under the United States and prohibited from accepting a decoration from the Rumanian Government in 1924. The Secretary of War to the Secretary of State, Dec. 11, 1924, MS. Department of State, file 093.712M82.

By the act of Congress approved July 1, 1930, it was provided that reserve officers not on active duty should not be held to be officers or employees of the United States or persons holding any office of trust or profit, and restrictions theretofore imposed on the acceptance of foreign decorations by members of the Officers' Reserve Corps were removed by the War Department. 46 Stat. 841; the Secretary of War (Dern) to the Secretary of State (Hull), July 13, 1935, and the Assistant Secretary of State (Carr) to Mr. Dern, Aug. 6, 1935, MS. Department of State, file 093.652/626. An act of Congress approved June 15, 1933, amending the act approved June 3, 1916, contains a similar provision in respect to officers of the National Guard. 39 Stat. 166, 190; 48 Stat. 153, 155.

As to enlisted men of the regular forces, of the Reserve Corps, and of the National Guard, see: The Assistant Secretary of War (Davis) to the Third Assistant Secretary of State (Wright), Nov. 9, 1923, MS. Department of State, file 093.552/62, wherein the War Department held that such enlisted men were not officers within the prohibition of article 1, section 9, of the Constitution; the Judge Advocate General of the Navy (Murnin) to the Secretary of State (Hull), May 8, 1934, *ibid.* 093.002/185, wherein the Judge Advocate General held, with the approval of the Secretary of the Navy, that enlisted men were officers of the United States within those provisions; the Assistant Secretary of State (Carr) to the Secretary of the Navy (Swanson), June 21, 1933, *ibid.* 093.172/50, and Mr. Hull to the Secretary of the Navy (Swanson), May 15, 1934, *ibid.* 093.002/185, expressing the view that "inasmuch as a reasonable doubt exists as to the authority of this Department under law to release the decoration, it is not possible to forward it to the destination desired until definite legislative authority therefor is obtained".

An act of Congress of June 12, 1916, authorizing officers and enlisted men of the United States Navy and Marine Corps to accept from the Haitian Government employment as officers of the gendarmerie "with compensation and emoluments from said Government of Haiti, subject to the approval of the President of the United States", was held by the Department of State not to authorize Americans so serving to receive decorations and medals as a part of the "emoluments". 39 Stat. 223; the Assistant Secre-

tary of State (Bliss) to Brigadier General John H. Russell, Feb. 15, 1923, MS. Department of State, file 093.382/2.

An act of Congress approved May 19, 1926, authorizing the President to detail officers and enlisted men of the United States Army, Navy, and Marine Corps to assist the governments of the American republics in military and naval matters, provides that such persons are authorized "to accept from the government to which detailed offices and such compensation and emoluments thereto appertaining as may be first approved by the Secretary of War or by the Secretary of the Navy, as the case may be". 44 Stat. 565. In 1930 the Judge Advocate General of the Navy and in 1931 the Secretary of the Navy expressed the opinion that the act was broad enough to include the acceptance of medals of merit awarded officers and enlisted men of the Navy and Marine Corps by the Government of Nicaragua, without authorization by Congress. The Acting Secretary of the Navy (Jahncke) to the Secretary of State (Stimson), June 19, 1930, enclosure, MS. Department of State, file 093.172 U.S. Marine Corps & Navy/1; Mr. Stimson to the Secretary of the Navy, July 21, 1930, *ibid.* /2; the Secretary of the Navy (Adams) to Mr. Stimson, Dec. 1, 1931, *ibid.* /9. In 1931 the Judge Advocate General of the Army ruled that the act could not be construed as Congressional authorization for the acceptance of medals conferred on Army officers and enlisted men by the Government of Nicaragua. The Secretary of War (Hurley) to Mr. Stimson, Nov. 24, 1931, *ibid.* /8. In 1932 the Department of State concluded that there was sufficient doubt as to its authority to deliver certain medals conferred by the Government of Nicaragua upon officers of the United States Army, Navy, and Marine Corps to warrant it in withholding them until Congress should have authorized delivery of them. The Assistant Secretary of State (White) to the Secretary of the Navy, Mar. 4, 1932, *ibid.* /21.

In 1907 the American Minister to Ecuador was appointed by the President of the United States as one of the arbitrators to settle certain differences between the Government of Ecuador and the Guayaquil & Quito Railway Company. The dispute was settled by a compromise agreement, and the railway company indicated that it was willing to pay the expense incurred by the Minister and to compensate him for his service in the arbitration. The Department of State authorized the Minister to accept payment of any expense incurred either by the Legation or by him personally. It stated, however, that "it would not comport with the dignity of the American diplomatic service nor be a wise precedent to establish to permit a party interested in an arbitration before an American diplomatic officer to remunerate him for the discharge of his duties in any capacity whatever".

The Assistant Secretary of State (Wilson) to the Minister to Ecuador (Fox), no. 97, Dec. 3, 1909, MS. Department of State, file 2540/168-169; 1909 For. Rel. 246, 247.

GOOD OFFICES IN TIME OF PEACE

§396

Section 3 of chapter XII of the Foreign Service Regulations of the United States provides (Jan. 1941):

Diplomatic and consular officers may, upon request and with the approval of the Department of State, temporarily assume the representation of foreign interests. They may not, however, perform any duty for a foreign government which involves the acceptance of an office.

[Ex. Or. 8077, Apr. 4, 1939.]

Note 1. *Advance authority from Department of State and consent of both foreign governments concerned requisite before assuming representation.* Except in an extreme emergency diplomatic and consular officers should not assume the representation of foreign interests unless they are instructed to do so by the Department of State, or have requested and received in advance the approval of the Department. The request for approval should contain detailed information. If representation has been assumed without advance authorization, a report in detail should be submitted immediately.

Both the foreign government in interest and the foreign government to which the officer is accredited or assigned must consent to the arrangement before a diplomatic or consular officer can assume representation. Either government may withdraw its consent at any time.

Note 2. *Restrictions placed on diplomatic and consular officers in representing foreign interests.*

(a) *Relation between officer and foreign government in interest.* A diplomatic or consular officer of the United States may represent a foreign government only in an unofficial capacity. . . . His status is that of an agent and he is responsible to the foreign government for services which he may perform in its behalf. That government in turn must assume all responsibility for such services.

(c) *Officer prohibited from performing duties detrimental to American interests.* A diplomatic or consular officer shall not perform any duties on behalf of a foreign power which might be detrimental to American trade or interests.

(d) *Officer prohibited from presenting claims.* A diplomatic or consular officer shall not present any claim on behalf of the citizens or subjects of the country whose interests he is representing against the government to which he is accredited or assigned.

(e) *Custody of foreign property and archives.* Diplomatic and consular officers are custodians of the property of foreign missions or consulates in their charge. They should, so far as possible, conserve such property. Any interference on the part of private individuals or officials should be made the subject of unofficial representation or protest to the authorities of the gov-

ernment to which an officer is accredited or assigned. As a means of protection, the flag of the United States may be raised over the building of a foreign mission or consulate, but this should not be done except with the consent of the authorities of the local government.

Note 3. *Manner of signing.* Diplomatic or consular officers representing the interests of other governments shall sign: "-----, American -----, in charge of the interests of -----."

Note 4. *Correspondence in connection with representation.* Any correspondence with either foreign government concerned must be conducted through the appropriate mission of the United States.

Note 6. *Function of representation attaches to office.* The function of representing a foreign interest attaches to the office rather than to the officer. When an office has once been authorized by the Department to undertake such representation, each succeeding officer is expected to assume the duties in connection therewith on his arrival at the post without requesting further authorization from the Department.

Note 7. *Termination of representation.* Representation is usually terminated by direction of the foreign government in interest. The representation and the property of the foreign government may not be relinquished except upon the receipt of authorization from the Department or from the foreign government. Officers shall not make any recommendations with reference to the appointment of a representative of foreign interests except upon the specific request of the foreign government desiring representation. In such case the officer shall make the recommendation directly to the foreign government and include in his recommendation the usual waiver clause designed to relieve both himself and the Department of State of responsibility in connection therewith.

In regard to the prohibition against the acceptance of an office in a foreign government by diplomatic and consular officers see: The Acting Secretary of State (Adee) to the German Ambassador (Von Sternburg), no. 632, Oct. 18, 1907, MS. Department of State, file 8130/6; Secretary Bacon to the German Ambassador (Von Bernstorff), no. 28, Feb. 27, 1909, *ibid.* /10; the Chief Clerk (Carr) to the Consul General at Beirut (Rayndal), no. 103, Apr. 10, 1909, *ibid.* /11. See also 1909 For. Rel. 205 (American Consular Agent at Tripoli, Syria, not permitted to accept appointment as German Vice Consul there but allowed to take custody of the German Consulate and to use his good offices for German subjects); the Third Assistant Secretary of State (Wilson) to the Consul at La Guaira (Moffat), no. 29, May 13, 1907, MS. Department of State, file 6360 (American Consular Agent at Barcelona, Venezuela, not permitted to accept position as German Consular Agent there but allowed to represent German interests at that place).

With regard to the requirement of advance authority from the Department of State and consent of both foreign governments before assuming

representation, see the Acting Secretary of State (Bacon) to the Minister in Greece (Jackson), no. 146, Mar. 13, 1907, MS. Department of State, file 5063; 1907 For. Rel., pt. 1, p. 583 (representation of interests of governments without diplomatic representation in Greece); Secretary Root to the Family Tinetti, May 5, 1908, MS. Department of State, file 13352 (refusal to intercede in behalf of two Italians in Guatemala without a request from the Italian Government and the consent of the Government of Guatemala).

During a suspension of diplomatic relations between Bolivia and Argentina in 1909, the American Ministers to those two countries were requested by each to take charge of the interests of its citizens in the country of the other. They were instructed by the Department of State to use their impartial friendly offices in behalf of Bolivian and Argentinian citizens, after having obtained the consent of the government to which they were accredited. The Minister to Argentina was instructed:

You will perceive . . . that your duties are to be confined to the exercise of good offices in behalf of Bolivian citizens and their interests in the Argentine Republic should occasion therefor arise: that you do not in any sense represent the Government of the Argentina Republic [*Bolivia*] diplomatically; that no representative office of any sort on behalf of that Government is bestowed upon you; and that you are not subject to its instructions or orders.

You will report to and receive instructions from your own Government only, which you are in no wise to commit or compromise.

The same instructions were sent, *mutatis mutandis*, to the Minister to Bolivia.

Secretary Knox to Minister Sherrill, no. 13, July 23, 1900, MS. Department of State, file 534/16; Mr. Knox to Minister Statesman, no. 19, July 23, 1900, *ibid.* /17; 1900 For. Rel. 10-13.

The exercise of good offices does not mean that the American Diplomatic or Consular officer becomes the official representative of another Government. The activities of an American Diplomatic or Consular officer, on behalf of the citizen or subject of a third power, do not, therefore, include the making of any demand upon the Government of the country to which he is accredited such as might be made on behalf of a citizen of the United States similarly circumstanced. Nor does the discretion of the American Diplomatic or Consular officer extend to the presentation of claims. If claims are preferred, the discretion of the Diplomatic or Consular officer extends only to the reporting of such claims to the Department of State, which will bring them to the knowledge of the Government by whose citizens or subjects they have been preferred. In other words, the Diplomatic or Consular officers authorized to employ unofficial good offices should limit their activities, on behalf of the citizen or subject concerned, to the transmission on his behalf, or on behalf of his Government, of

such communications or statements as he may find it necessary to make.

An authorization to exercise unofficial good offices does not include the duty of issuing passports, or documents of nationality, unless such right has been specifically granted by the Government on whose behalf such good offices have been extended.

In the case of countries wherein certain powers enjoy extra-territorial privileges by virtue of treaty stipulations, providing for the exercise by Consular officers of certain Judicial functions, an authorization to employ unofficial good offices does not include the exercise by American Diplomatic or Consular officers of such judicial functions on behalf of the citizens or subjects of those countries in whose interest such offices have been authorized.

The Secretary of State (Colby) to the Chargé d'Affaires ad interim in Tokyo (Bell), no. 360, July 30, 1920, MS. Department of State, file 394.54/-.

Pursuant to a request from the Government of the United States, the Panamanian Government in 1905 issued a decree permitting American diplomatic and consular officers to exercise their good offices in behalf of Chinese subjects in Panama, as requested by the Chinese Government, when the occasion required. The Department, on May 27, 1907, instructed the Minister:

With respect to the statement made by the Minister for Foreign Affairs in his note to you of January 29, 1907, . . . that consular officers of the United States are not warranted in assuming the settlement of the estates of Chinese subjects in the same manner as those of American citizens, I have to say that such good offices as are used in Panama by our diplomatic and consular officers in behalf of Chinese subjects and interests are exercised only with the consent of the Panaman Government, and that, therefore, our officers in Panama cannot undertake to administer upon estates of Chinese except with the full consent of the Panaman Government, which, it would appear from your despatch and its enclosures, will not be given.

The Chinese Chargé d'Affaires in Washington subsequently expressed the desire that the diplomatic and consular representatives of the United States on the Isthmus exercise their good offices in behalf of Chinese subjects affected by a decree of the Panamanian Government establishing rules regarding Chinese, Syrians, and Turks residing in Panama. The Department, on December 4, 1907, instructed the Minister in this connection:

Under the arrangement by which you are permitted to lend your good offices, when they are required, in favor of Chinese subjects resident in Panama, you may do so when called upon with reference to matters arising under the Decree in question. In a concrete case, for example, you might informally suggest a

favorable exercise of such administrative discretion as might be applicable.

It is understood that the Chinese Legation regards the provisions of the Decree as harsh. Under these circumstances you should bear in mind that, if you are asked to communicate remonstrances against provisions of the Decree, your good offices should be confined to a transmission of such representations and should not place you in the position of taking exception to such provisions in your capacity of an official of this Government.

The Assistant Secretary of State (Porter) to the Consul General in Panama (Adamson), no. 34, Aug. 26, 1885, MS. Department of State, 115 Instructions to Consuls, 126 (for extracts from this instruction, see 1902 For. Rel. 318); the Minister to Panama (Barrett) to the Secretary of State (Hay), no. 131, Apr. 17, 1905, MS. Department of State, 3 Despatches, Panama; the Acting Secretary of State (Loomis) to Mr. Barrett, no. 46, Apr. 17, 1905, *ibid.* 1 Instructions, Panama, 95; the Acting Secretary of State (Bacon) to the Minister to Panama (Squiers), no. 43, May 27, 1907, *ibid.* 6610; Secretary Root to Mr. Squiers, no. 66, Dec. 4, 1907, *ibid.* 4516/2-3; 1905 For. Rel. 708; 1907 For. Rel., pt. 2, pp. 932, 933.

Pursuant to a request in 1908 from the Chinese Minister that, in the absence of treaty and diplomatic relations between China and Chile and China and Ecuador, the American diplomatic and consular officers in Chile and Ecuador be allowed to exercise good offices in behalf of Chinese subjects living there, the Department instructed the Minister at Quito (and also at Santiago) as follows:

You will accordingly, with the consent of the Government of Ecuador, take under the protection of your Legation Chinese subjects and their interests in Ecuador. Your good offices will be confined to friendly intervention in case of need for the protection of the Chinese in their persons and property, and should be exercised by you and the consular officers without the assumption of any representation [*sic*] function as agents of China.

It of course follows that American officers so acting cannot officially certify to the fact of Chinese citizenship, original certification of which can be made only by a responsible agent of the Chinese Government. A form of certificate to be used by you and the consular officers should, therefore, be prepared in consultation with the Ecuadorian [*sic*] Minister for Foreign Affairs, in order that it may correctly express the character of the protection afforded, and the degree in which it is recognized by Ecuador. It is suggested that the following form, or a similar one, may perhaps be satisfactory:—

"I, -----, ----- of the United States of America, CERTIFY: That ----- claims to be a subject of the Emperor of China, resident in Ecuador and that, upon his proving his status as a Chinese subject, he will in case of need, be entitled to the protection of the Government of the United States and to the good offices of the diplomatic and consular officers thereof, while in Ecuador, in pursuance of an understanding between the Governments of Ecuador and China to that end."

The nature of the action to be taken by American consular and diplomatic officers in behalf of the Chinese subjects was further elucidated in 1909 in an instruction to the Consul General at Guayaquil:

This Government desires its representatives to endeavor to protect Chinese from oppression and injustice, but in using their good offices in accordance with the Department's instructions American officials should remember that this Government cannot lend its support to Chinese who may desire to use such influence to strengthen their position in factional quarrels nor can it permit them to invoke the threat of American interference in the settlement of private differences.

The Acting Secretary of State (Adee) to the Minister to Ecuador (Fox), no. 61, Aug. 22, 1908, MS. Department of State, file 15077; the Chief Clerk (Carr) to Consul General at Guayaquil (Dietrich), no. 155, Mar. 13, 1909, *ibid.* /81.

With respect to the exercise of good offices on behalf of China, see For. Ser. Reg. U.S. XII-3, n. 11, Jan. 1941.

In an instruction in 1920 to the Chargé d'Affaires ad interim in Tokyo the Department of State said that—

the Swiss Government leaves each one of its citizens, who may settle in a country where the Swiss Confederacy has no Diplomatic or Consular agent, entirely free to choose the power under whose protection he will place himself. In other words, it is the understanding of the Department that the exercise of good offices in behalf of Swiss citizens in a particular country has not been vested exclusively in the Diplomatic and Consular authorities of the United States but has also been undertaken by French and also, possibly by representatives of other governments. On this understanding of the matter it appears to the Department obviously inadvisable that the representatives of the United States should undertake to deal in any way with the authorities of the Government to which they are accredited in regard to any Swiss interests which may be at the time or which may previously have been under the care of any other friendly nation. In such cases, therefore, the Mission or Consular office concerned should take adequate steps to assure itself that no such conflict of authority is involved. In no case, however, should representation of the interests of any foreign Government or the citizens or subjects of such Government be undertaken until permission or authorization has been obtained from the Department and then only with the consent of the country to which you are accredited.

Secretary Colby to Chargé Bell, no. 360, July 30, 1920, MS. Department of State, file 39454/-.

In 1920 the Department of State authorized the American Legation in Siam, during the absence on leave of the Danish Chargé d'Affaires, to exercise, with the consent of the Siamese Government, good offices

in diplomatic affairs on behalf of the Danish Government. The Legation was instructed that this did not include the exercise of any judicial functions which the Danish Chargé might have exercised under extraterritorial rights claimed by the Danish Government. It was also instructed that it might affix Danish visas on passports issued by the appropriate Danish authorities but that it should not issue any documents of Danish nationality except upon the explicit request of the Danish Foreign Office.

In extra-
territorial
countries

Secretary Lansing to the Legation at Bangkok, telegram 6, Feb. 12, 1920, MS. Department of State, file 704.5992/4.

In 1921 the Government of the United States at the request of the Netherlands Government assumed representation of its interests in Persia on the express understanding that this did not include the exercise of judicial functions in behalf of Dutch nationals and that these functions would continue to be exercised by the Netherlands consular officer at Teheran. In 1925 the Dutch Chargé d'Affaires ad interim in Washington informed the Department of State that, as a result of the death of that consular officer and of the fact that the only remaining Dutch consular officers in Persia were not in a position to exercise judicial functions in the Persian Foreign Office Tribunal, it had recently proved impossible to summon before that court a Dutch subject for trial in connection with the failure of a pawnbroker's shop. The Chargé requested the co-operation of the Government of the United States in proceeding with the cause without delay and asked that the American Chargé d'Affaires at Teheran be authorized to take the necessary steps so that the case in question might be tried in the customary way.

The Department informed the American Legation at Teheran of the authorization of the Netherlands Government for the attendance of a representative of the Legation or the American Consulate at proceedings of the Foreign Office Tribunal in the case under discussion and indicated that the authorization was to be strictly construed and was not to imply the acceptance by the Legation or the Consulate of any obligation to take further steps of a judicial or quasi-judicial character in that case or in the case of any other Dutch subject; and it stated specifically that, in its opinion, neither the Legation nor the Consulate would, on the basis of the authorization, be competent to take steps toward executing any judgment which might be rendered by the Foreign Office Tribunal in the case.

The Under Secretary of State (Grew) to the Chargé d'Affaires ad interim of the Netherlands (Van Wyck), July 14, 1925, and Secretary Kellogg to the Legation at Teheran, telegram 44, July 14, 1925, MS. Department of State, file 704.5691/28.

At the time of the severance of diplomatic relations between the United States and Venezuela on June 13, 1908, the protection of French interests in Venezuela, which had been undertaken by the United States upon the severance of French relations with Venezuela, was transferred to the Brazilian representative in Venezuela. The Brazilian Minister suggested subsequently that the protection of French interests be undertaken by Mr. Buchanan, who had been sent by the United States as High Commissioner to Venezuela for the purpose of negotiating a settlement of certain outstanding claims. The Department of State instructed Buchanan that this was impossible as he was not a resident diplomatic agent and was to leave Caracas immediately upon establishing a basis for resumption of diplomatic intercourse. Upon the reestablishment, in 1909, of regular diplomatic relations with Venezuela by the accrediting of a Minister at Caracas, the protection of French interests was again undertaken by the United States at the request of the French Government.

Secretary Root to High Commissioner Buchanan, Jan. 15, 1909, MS. Department of State, file 15363/12; the Acting Secretary of State (O'Laughlin) to the Minister in Venezuela (Russell), no. 143, Mar. 3, 1909, *ibid.* /20.

**Flags and
coats of
arms**

The American Consul at Colón, Panama, in 1907 requested the Department of State to obtain for him coats of arms, seals, and flags of the Governments of China, Cuba, and Greece, whose interests he represented. The Department denied the request, stating:

Your signature to all documents signed in the interests of China (Cuba or Greece) should be as American Consul followed by the words "In charge of the interests of China" (Cuba or Greece as the case may be). Inasmuch as you do not and cannot under the Constitution hold a commission as a representative of any of these Governments it is not proper for you to attach the seal of the foreign Government to such documents. Neither is it necessary to display the coats of arms of the foreign Governments in whose interests you may be acting nor to fly the flags of those countries on their national holidays.

The Chief Clerk (Carr) to Consul Kellogg, no. 49, Jan. 3, 1908, MS. Department of State, file 7066/5.

On June 20, 1908 the Brazilian Minister to Venezuela informed the Venezuelan Government that he had assumed charge of American interests in that country. In writing to the Brazilian Ambassador in Washington on July 10 the Acting Secretary of State expressed the hope that there would be no inconvenience in displaying the Brazilian flag over the American Legation building if it became necessary or desirable to display a flag. The Ambassador stated

that the Brazilian Minister to Venezuela would take note of the Acting Secretary's wish.

Acting Secretary Adee to Ambassador Nabuco, no. 61, July 10, 1908, MS. Department of State, file 4832/31-32; Mr. Nabuco to Mr. Adee, July 14, 1908, *ibid.* /34. See also 1908 For. Rel. 826, 827.

The American Consul General in charge of Greek interests in the Republic of Panama received in 1908 instructions from the Minister of Foreign Affairs of Greece to take charge of the estates of Greek subjects who had died within the Canal Zone. The Department of State asked the Greek Minister in Washington to inform his Government that, as the Canal Zone was "under the sovereignty of the Government of the United States", it would not be feasible for the American Consul General at Panamá to act therein in representation of Greek interests, and to suggest to it that, in as much as the jurisdiction of the consuls of other countries at the city of Panamá extended also to the Canal Zone, it would be well for it to arrange with some other government to have its consular officer at Panamá look after Greek interests in the Zone.

In Canal
Zone

Secretary Root to Minister Coromilas, Oct. 7, 1908, MS. Department of State, file 13409/1.

The American Consul at Puerto Cabello, Venezuela, in 1908, in the absence of the Brazilian Consul at that port, dispatched the S.S. *Rio Amazonas* for Belén del Para (Belém), Brazil, and requested to be instructed by the Department as to the proper disposition of the fees collected for verifying the manifest and register of the vessel and for certifying to an invoice of goods shipped on it. The Department replied that it had no record of having given him any authority to represent the interests of Brazil or that the Government of Brazil desired him to do so, and informed him that he should have refused to act in that capacity in the absence of express permission from the Department. The Consul was instructed to transmit the fees to the Brazilian Minister in Venezuela for such disposition as he might deem proper.

Unauthor-
ized good
offices

The Third Assistant Secretary of State (Wilson) to Consul Johnson, no. 27, Sept. 15, 1908, MS. Department of State, file 15273.

Acting under instruction from the Department of State, the Vice Consul at Nogales, Mexico, in January 1914 addressed General Carranza asking for protection for a certain mine owned by some Spaniards and Mexicans, and one American. Carranza's Secretary of Foreign Affairs replied that representations and claims of those foreigners should be made to General Carranza through the Secretary

In time of
revolution

of Relations by the diplomatic representatives of the countries to which they belonged. The Department instructed the Vice Consul:

The foreign powers have and can have in the Mexican Republic only one set of diplomatic representatives, and those representatives are, as General Carranza is aware, at the City of Mexico, which is the capital of the Republic. That city is in the possession of the administration presided over by General Huerta, which exercises actual control, north and south, over a number of the States of the Republic. In these circumstances it is no more possible for the diplomatic representatives at the City of Mexico to address representations to General Carranza, than it would be for them, if the case were reversed, to address representations to General Huerta.

In these circumstances the consular representatives of foreign Governments, including those of the United States, have, in conformity with the usages and necessities incident to such a situation, made unofficial representations to the local authorities in the territory controlled by General Carranza and the forces that acknowledge him as their leader. At various points, however, within that territory, countries other than the United States are not represented by consular officers, and unless representations can be made in behalf of their citizens through the American consuls, such representations can not be made at all.

The representations thus made through the American consular officers in behalf of other foreigners are strictly in accordance with international law and usage. It is a common thing for the consular representatives of one country to act in an unofficial capacity for the citizens or subjects of other countries. This is a matter of constant, indeed almost daily, occurrence, in peace as well as in war. To prohibit the exercise of such friendly offices would in any circumstances be a deplorable act; but, in the midst of conditions such as exist today in Mexico, it assumes an aspect peculiarly grave and could not fail to give rise to a feeling of anxiety.

In April 1914 General Carranza expressed his willingness for the Government of the United States to make representations in behalf of the nationals of other governments in sections where such governments had no representatives, provided the governments concerned would request the Government of the United States to make such representations.

Vice Consul Simpich to Secretary Bryan, no 289, Feb. 19, 1914, and Mr. Bryan to Mr. Simpich, no. 386, Mar. 2, 1914, MS Department of State, file 312.32/180; Counselor Lansing to the German Ambassador (Von Bernstorff), Apr. 17, 1914, *ibid.* /236 See also 1914 For. Rel. 793, 794-795, 807.

During disturbances in Honduras in 1924 the Department of State instructed the Consuls on the north coast of that country that they should use their informal good offices to protect the lives and property of foreigners other than Americans where it was practicable to do

this without interfering with their primary duty to protect American interests. They were told that they might cooperate with the representatives of other foreign governments or might act as a channel of communication between other foreigners and their own diplomatic and consular representatives in Honduras or, by sending messages through the Department, in the United States. It was stated that the British, Italian, and Chinese Governments particularly had asked the Government of the United States to use its good offices to protect the interests of their nationals in Honduras.

Secretary Hughes to the Legation at Honduras, telegram 120, Sept. 4, 1924, MS. Department of State, file 815.00/3317a.

In response to a request by the Minister in Nicaragua for general instructions for his guidance in regard to the deportation of Guatemalan political refugees from the country in which they took refuge to that from which they fled, the Department of State said that—

Political
refugees

it will always be proper for you to communicate to the American representatives in any other of the Central American republics inquiries as to well being and treatment of Guatemalans arrested in their respective countries, it being understood that action by your colleagues on such requests is by way of friendly good offices in the absence of competent Guatemalan representation; and that the sole purpose and desire of the United States in authorizing unofficial intermediation in this sense is to promote good will between the several republics and to help toward averting any incident in their relations which might arouse unkindly feelings or tend to disturb the cordial harmony we so earnestly desire.

Copies of the instructions were also sent to the American representatives in El Salvador, Guatemala, and Honduras, with the comment that—

the Department desires to impress upon you that in the exercise of your good offices in matters of such delicacy, your aim should be, not to prefer and support complaints, but to do what you can to avert ground for complaint.

Acting Secretary Adee to Minister Coolidge, no. 9, Sept. 26, 1908, and Mr. Adee to Ministers Dodge and Heimke and Secretary Gibson, Sept. 26, 1908, MS. Department of State, file 13039/2-5.

. . . When an office of the United States has been authorized to undertake representation of the interests of a foreign government . . . any officer of the United States who discharges consular duties for that foreign government is not a consular officer of the foreign government but is an agent of it only insofar as the discharge of duties and responsibility for his official acts are concerned. The tariff of fees of the foreign government

Fees

should be followed, if available, but if not, the United States Tariff of Foreign Service Fees is applicable. To the extent to which the laws or instructions of the foreign government permit the consular officer to retain fees collected in its name, these fees are the fees of the consular office and must be paid over and accounted for to the Government of the United States. Fees collected by a diplomatic or consular officer for these services, which the officer is not authorized to retain, shall be disposed of and accounted for in accordance with the instructions of the Secretary of State.

For. Ser. Reg. U.S. V-21, May 1939; Ex. Or. Sept. 3, 1938.

Prior to Feb. 10, 1914 American consular officers were permitted to retain those fees for services performed in behalf of a foreign government which they were not required to turn over to that government; they were not obliged to turn them in to the United States Treasury. The Third Assistant Secretary of State (Wilson) to the Consul at Maracaibo, Venezuela (Plumacher), no. 410, Apr. 25, 1907, MS. Department of State, file 347/5; the Chief Clerk (Carr) to the Consul at Colón (Kellogg), no. 43, Sept. 16, 1907, *ibid.* 4516/1; the Acting Secretary of State (Adee) to the Minister in Ecuador (Fox), no. 61, Aug. 22, 1908, *ibid.* 15077.

On Feb. 10, 1914 the Comptroller of the Treasury rendered a decision in respect to the performance of services for the Government of Panama, which was construed by the Department to be applicable to services rendered by American consular officers for any foreign government, and the substance of which was embodied in chapter 5, section 21, of the Foreign Service Regulations quoted above. The Director of the Consular Service (Carr) to consular officers, general instruction, consular, no. 330, July 10, 1914, MS. Department of State, file 600.00223.

In July 1909 the American Chargé d'Affaires in Constantinople (Istanbul) requested instructions regarding the fees to be collected by foreign consular officers temporarily in charge of American interests in localities within the Ottoman Empire. He stated that he had advised a Russian officer to regulate such collections by the Russian schedule while temporarily in charge of American interests. The Department of State replied:

As these officers are in no sense American representatives, the Department does not see that it has anything to do with the question of fees (unless a matter of an exorbitant fee should be brought to its attention).

Your suggestions to the Russian Vice Consul are therefore approved.

Chargé Einstein to Secretary Knox, no. 1056, July 20, 1909, and Acting Secretary Adee to Mr. Einstein, no. 544, Aug. 12, 1909, MS. Department of State, file 20938.

From April 12, 1914 to December 13, 1917 the British Vice Consul at Salina Cruz, Mexico, with the permission of the British Government, was in charge of American interests in that district. The Acting

Secretary of State wrote to the President on April 20, 1926 that, owing to the disturbed political condition in Mexico during that period, the care of American interests had been an exceedingly delicate and exacting task and that the only allowance which the Government of the United States had made to the Vice Consul had been for expenses incurred by him in connection with that care. He stated that the fees collected by the Vice Consul for consular services on behalf of the United States were transmitted to this Government and duly deposited in the Treasury of the United States and that he had been informed that the question of compensation for his services would be reserved for future consideration. The Acting Secretary declared that it was customary for the Government of the United States, upon the request of a friendly government, to authorize its diplomatic and consular officers to take charge temporarily of the interests of that government without remuneration for their services and that foreign governments frequently lent the aid of their officers to the United States under like conditions. However, the case of the British Vice Consul, he said, appeared to be exceptional since he received no salary from the British Government and since his care of American interests interfered materially with his private affairs. He said:

. . . The circumstances appear to be so unusual, and the period of his service for the United States so extended, that it would seem that this Government could not properly do less in recognition of the value of his services than to present him, as an act of grace, with an amount which would appropriately compensate him. It is understood that the British Government would not object to this course.

The sum of \$9,200 was appropriated by an act of Congress approved May 29, 1928.

The Acting Secretary of State (Grew) to President Coolidge, Apr. 20, 1926, MS. Department of State, file 703.4112/160a; 45 Stat. 883, 912.

The Turkish Ministry of Foreign Affairs in 1930 informed the American Ambassador in Istanbul that the Soviet regime had given its approval for the acceptance and legalization by the Turkish Consulate at Leninakan of notarial deeds for use in the United States, provided like powers were conferred on all Turkish Consulates in the U. S. S. R. The Department of State instructed the Ambassador that it saw no objection to the Turkish Government's authorizing Turkish consular officers in Russia to perform notarial services in connection with documents for use in the United States.

The Assistant Secretary of State (Castle) to the Ambassador to Turkey (Grew), no. 269, Sept. 26, 1930, MS. Department of State, file 811.0492/69.

Deceased
nationals
of country
represented

It is understood that Spanish consular officers, as well as the Spanish Ambassador, represent Turkish interests in the United States. In the absence of applicable treaty provisions, the authority of a consular officer with respect to the interests of a deceased national of a country for which he is acting, is dependent on the one hand on the laws of the state in which the deceased national resided or owned property and on the other hand on the laws of the country by which he was appointed or which he represents and the instructions given to him by his Government.

The Under Secretary of State (Phillips) to C. D. Royal, July 16, 1923, MS. Department of State, file 104.Iowa-Hannoon, Fatima.

Relations
with courts

The District Court of the United States declined to release the Turkish vessel *Gul Djemal* upon the basis of a suggestion filed with the court by the Spanish Ambassador in charge of Turkish interests in the United States and of letters exchanged between him and the Acting Secretary of State in which the former stated that he had been requested by the Turkish Government to obtain the vessel's release and the latter stated that the Department of State would be glad to give consideration to any representations he might make in relation to the detention of the vessel. District Judge Knox said that he realized "that a breach in diplomatic relations does not bring about a cessation of all intercourse between the states concerned", but that he was convinced that once diplomatic relations were severed intercourse thereafter so far as the Government of the United States was concerned should be confined exclusively to the Department of State. He declared that he would gladly release the vessel upon a suggestion emanating from that Department.

The Gul Djemal, 296 Fed. 563, 566 (S.D.N.Y., 1920, 1921). For the subsequent history of this case, see 296 Fed. 567 (S.D.N.Y., 1922); 264 U.S. 90 (1924).

GOOD OFFICES IN BEHALF OF BELLIGERENTS

§397

The Foreign Service Regulations of the United States provide that in assuming charge of the interests of a foreign power (or of its subjects or citizens) at war with the country to which an officer is accredited or assigned, the officer's position "is that of a representative of a neutral power and every care must be exercised to maintain this position".

For. Ser. Reg. U.S. XII-3, n. 8, Jan. 1941.

In circular instructions of August 17, 1914 addressed to the diplomatic and consular officers of the United States entrusted with the

interests of foreign governments at war with the governments to which such officers were accredited, the Department of State said:

In the first place it is important to recall that the care and protection of foreign interests in both peace and war is based upon the consent of both foreign governments concerned. The consent, having been freely given, may as freely be withdrawn by either, and as a consequence you must exercise the extra duties imposed upon you with candid impartiality.

In the second place, the arrangement contemplates the exercise of no official function on your part, but only the use of unofficial good offices. You are not officers of the unrepresented government. A diplomatic or consular representative of the United States can not act officially as a diplomatic or consular representative of another power, such an official relation being prohibited by the Constitution of the United States. But apart from the fact of legal disability the relations of the foreign governments concerned necessarily imply personal and unofficial action. The state of war existing between the country to which you are accredited and the country for which you are acting, is inconsistent with the continuance of diplomatic intercourse between them. Any suggestions on the part of either country for such intercourse should be referred to the Department for its consideration. It is expected that overtures looking to the resumption of diplomatic intercourse will, if made through the medium of the United States, be addressed to this Government for transmission to the belligerent concerned.

Your position, therefore, is that of the representatives of a neutral power whose attitude toward the parties to the conflict is one of impartial amity. In your interposition in behalf of the subjects or citizens of one of the belligerents you should use every care so that it will be regarded, not as an act of partisanship, but as a friendly office performed in accordance with the wishes of both parties. You should especially avoid any action which might compromise the United States as a neutral or affect the amicable relations between it and the country to which you are accredited. While you are thus exercising these unofficial functions with impartiality and discretion, you will, nevertheless, examine all complaints, which may be laid in behalf of foreign subjects or citizens under your protection, and give to them such assistance and make such representations to the authorities of the country to which you are accredited as may seem to be appropriate in accordance with these special instructions and the standing instructions of the Department.

In conclusion the Department anticipates that in some cases questions may arise regarding your authority over the buildings and other property of the foreign mission or consulate in your charge. You are advised, therefore, that your function in this respect is merely that of a custodian of the property and archives of the unrepresented government. Any interference on the part of private persons or officials with such property should be the subject of an unofficial representation or protest to the authorities of the government which is, by the rules of international law,

charged with the security of diplomatic and consular premises and archives of foreign governments. If in connection with these duties you are requested or it appears desirable as a means of protection to raise the flag of the United States over the building of a foreign mission or consulate, you will bear in mind that this should not be done except with the consent of the authorities of the government to which you are accredited, and in strict compliance with the laws of the land.

The officers were also instructed to keep accurate accounts of all additional expenses incurred.

Secretary Bryan to diplomatic and consular officers, Aug. 17, 1914, MS. Department of State, file 704.00/4A; 1914 For. Rel. Supp. 740-741.

The Department of State instructed the ambassadors and ministers in belligerent countries on August 27, 1914 as follows:

... To maintain the neutrality of this Government and of its diplomatic representatives during the present war and the proper observance and appreciation of the principle that the good offices which are being extended by American diplomatic representatives in behalf of any belligerent in a country hostile to it are entirely personal and unofficial, it is necessary that all messages that could be construed to relate to military or naval operations received by an American diplomatic official for transmission from a belligerent to another belligerent or from a belligerent country to any of its diplomatic or other officials should be transmitted through the Department of State.

The Secretary of State (Bryan) to the ambassadors and ministers in belligerent countries, circular telegram of Aug. 27, 1914, MS. Department of State, file 763.72111/283a; 1914 For. Rel. Supp. 742.

On March 20, 1916 the Department of State wrote to the American Ambassador in Austria-Hungary with regard to the position of American diplomatic and consular officials who were exercising good offices in behalf of the interests and subjects of various belligerent countries in Austria-Hungary, saying:

The Department is aware of the delicate position in which the Embassy is placed, and is confident that the Embassy appreciates that it is merely acting as a channel of communication and not with authority to present demands as some of the governments seem to believe. The department has always been careful to draw a distinction between perfunctory good offices and original exercise of representative functions; and if any one of the belligerent governments "insists" or "demands" anything of an enemy government, it is the function of the Government of the United States to communicate such "demand" *without comment*. If the representative of the United States is in position to ask anything originally, he "requests" it or "invites consideration."

Acting Secretary Polk to Ambassador Penfield, Mar. 20, 1916, MS. Department of State, file 124.636/24; 1916 For. Rel. Supp. 819.

In April 1917 the Swiss Minister in Great Britain, then in charge of German interests in that country, requested the American Ambassador to turn over to him the archives of the former German division of the American Embassy covering the period from the outbreak of war to the severance of diplomatic relations between the United States and Germany, during which time the American Ambassador had been in charge of German interests in Great Britain. The Department of State instructed the Ambassador that it could not authorize him to turn these archives over to the Swiss Minister as the Government of the United States must necessarily keep a complete record of its past activities on behalf of Germany. He was authorized, however, to furnish the Minister with copies of correspondence concerning German interests received after the severance of relations and to allow him, so far as it seemed desirable, to consult the Embassy's German files. He was also authorized to offer the temporary services of clerks whom he had formerly employed in the German division.

Ambassador Page to Secretary Lansing, telegram 5993, Apr. 13, 1917, and Mr. Lansing to Mr. Page, telegram 4703, Apr. 17, 1917, MS. Department of State, file 704.6241/31; 1917 For. Rel., Supp. 1, pp. 626-627.

After the outbreak of war in Europe in September 1939 the Government of the United States assumed representation of British and French interests in Germany and in certain German-occupied countries. The Department of State instructed the American officers in those countries on December 16 as follows: 1939

In the representation of French and British interests, the American Government desires in general to act only in response to specific instructions from the French and British Governments and the Governments of the British Dominions and India.

Accordingly, in response to any specific requests from French citizens or British subjects to transmit messages or to obtain information on their behalf from Germany you are directed to inform the inquirers in the above sense and to suggest that they may wish to address requests on such matters to their respective governments for transmission through official channels if action by this Government is desired.

In as much as the American Government does not represent German interests in any country, German nationals who may request that letters or messages be submitted on their behalf to French citizens or British subjects should be informed that you cannot entertain such requests. In appropriate instances, it may be suggested to them that they may wish to make such requests of their own Governments for possible reference to the Swedish Government in the case of messages for French citizens or to

the Swiss Government in the case of messages for British subjects.

The Assistant Secretary of State (Messersmith) to diplomatic and consular officers, Dec. 16, 1939, diplomatic serial 3172, MS. Department of State, file 704.4100/5A.

1940 . . . whenever requested by the representative of another country to take over its interests the suggestion should be made in reply that the request be made of the Department formally by the government concerned, and the Department's instructions should be promptly sought by telegraph. Ordinarily, the Department will authorize the interests to be taken over provisionally whenever requested by the Foreign government's representative, pending the receipt of that government's formal request. At the same time it may be pointed out to the official making the request that while every possible effort will be made to protect any interests that may be taken over the circumstances of modern warfare make it difficult to foresee the extent to which the representatives of this Government may be able to protect the property and other interests of another government in all contingencies. The Department should be promptly informed by telegraph when the interests of another country are actually taken over. The local authorities should likewise be notified and informed of the location of the property taken under this Government's protection.

. . . It will be appreciated that specific instructions cannot be issued in advance to meet every contingency which may arise in connection with the protection of another country's interests. Chiefs of missions will have to be guided largely by circumstances concerning the course of action to be adopted. If practicable, trustworthy personnel should be assigned to take custodial charge of the diplomatic and consular buildings and such possessions of the representative staffs as may not be taken away. There should be affixed to the premises a notice under the seal of the mission or consular office stating that the property is under the protection of the United States of America.

. . . The representation of foreign interests within a given country will be centralized in the mission, or principal consular office if there is no mission. Immediately upon taking over the interests of another country the mission should instruct all offices within its jurisdiction to inform it of the amount of any funds each has taken over from departing representatives of the country concerned and of the amounts necessary for anticipated expenditures to the end of the next semester. The mission will then inform the Department by telegraph of the total amount of funds taken over and its estimate of the further amount, if any, needed for the representation of the interests of the country concerned until the end of the next semester. The mission will authorize necessary anticipated expenditures at each office for the following semester and will instruct each office to remit to it all surplus funds. The mission will receipt to each office for the amount remitted to it. From these surplus funds and additional funds that it may request the Department to obtain for it

from time to time from the government of the country concerned, the mission will allocate additional funds to the offices under its jurisdiction to cover further needs as they may arise.

The Acting Secretary of State (Welles) to the Legation in Bern, telegram 37, Apr. 30, 1940 (enclosure to circular to diplomatic and consular officers, May 8, 1940, diplomatic serial 3228), MS. Department of State, file 704.00/562B.

On May 11, 1940 the Department of State informed the American Legation at The Hague that its authorization to take over British interests was limited by the proviso that it be clearly understood that the property and archives entrusted to its care should embrace only British property and archives. This was due, it was stated, to the fact that it was understood that certain British missions had in their possession Polish archives and other property and that the German Government had adopted the attitude that the Polish Government no longer existed and that it could not permit a third government to represent Polish interests in territories under German control.

Secretary Hull to the American Legation at The Hague, telegram 84, May 11, 1940, MS. Department of State, file 704.4156/9A

Upon the breaking off of diplomatic relations between the United States and Germany in February 1917 American interests in Germany were entrusted to the care of the Spanish Embassy at Berlin. The Department instructed the American Ambassador in Spain to say to the Spanish Foreign Office that it was desired that the interests of the Government of the United States should be entrusted only to those officers who were Spanish subjects by birth. The Spanish Government replied in March 1917 that it was taking all steps necessary to accomplish this and was then completing the necessary Spanish personnel at the Embassy in Berlin.

Non-enemy
personnel

Secretary Lansing to Ambassador Willard, telegram 215, Feb. 5, 1917, MS. Department of State, file 703.5262/b; Mr. Willard to Mr. Lansing, telegram 403, Mar. 10, 1917, *ibid.* /7; 1917 For. Rel., Supp. 1, pp. 610, 611.

The American Ambassador to Spain informed the Department of State, on Feb. 13, 1917, that the American Ambassador in Germany had asked the Spanish Ambassador in that country to employ Vice Consul von Versen, an American citizen who was German by birth, to assist in connection with American interests when the Spanish Ambassador took charge of American interests in Germany. The Department gave consent to his temporary employment. Ambassador Willard to Secretary Lansing, telegram 350, Feb. 13, 1917, MS. Department of State, file 124.62/39; 1917 For. Rel., Supp. 1, p. 611.

The Swiss Government assumed the representation of German interests in the United States upon the breaking off of diplomatic

relations between the United States and Germany in February 1917. In June 1917 the Swiss Legation was informed by the Department of State that all former German consular secretaries (commissioned officers) then attached to the Swiss Legation or Swiss Consulates must either depart from the United States or resign their positions. The German Government indicated that it would withdraw permission for Americans to work at the Spanish Embassy in Berlin (in charge of American interests in Germany) if the German employees at the Swiss Legation in Washington were dismissed. The Department of State instructed the Chargé d'Affaires in the Netherlands to inform the Spanish Minister that it had no alternative but to request the Swiss Legation in the United States to dispense with the services of the former German Embassy employees.

Memorandum of the Acting Chief of the Division of Western European Affairs (Sterling), June 20, 1917, MS. Department of State, file 705.6254/11; Secretary Lansing to Chargé Langhorne, telegram 585, July 3, 1917, *ibid.* 703.5262/19; 1917 For. Rel., Supp. 1, pp. 613, 614.

**Transmission
of legal
documents**

In reply to your letter of January 4, 1918, in which you ask to be informed whether it is permissible for the Swiss Legation in Washington to transmit legal documents from Germany through official channels, I beg to state that the forwarding of such communications by the diplomatic representatives, in charge of the interests of a power with which this country is at war, is a practice which has universally been followed by the belligerents in this war. In a similar way the Department of State is forwarding, after investigation of each individual case, legal documents from persons in this country to the Spanish Ambassador in Berlin, in charge of American interests, for transmission to private persons in Germany, where the sole beneficiary under the legal document is an American citizen. Such documents, however, should be always submitted to the State Department or the German Foreign Office, as the case may be, for their approval before final transmission to the addressee.

Leland Harrison, Office of the Counselor, Department of State, to Commander McCauley, Assistant Director of Naval Intelligence, Jan. 14, 1918, MS. Department of State, file 701.03/38a.

In a reply of April 30, 1920 to a letter stating the desire of the writer to obtain the deposition of a German citizen in Berlin and inquiring whether the deposition could be taken before the Spanish Ambassador in that city or a notary public there, the Department of State said that—

**Notarial
acts**

this Government is still technically in a state of war with Germany and has not entered into diplomatic relations with that country. Communication is, however, now open to Germany, and it is probable that the deposition could be taken before a German official whose signature might then be authenticated by

the Spanish Embassy. The admissibility of such evidence is a matter to be determined by a court of appropriate jurisdiction, and not one in which the Department is in a position to advise you. In this connection, however, it may be stated that the representatives of the Spanish Government in charge of American interests in Germany are not regarded by this Department as the official representatives of the American Government, but merely as exercising their good offices on behalf of this Government, under the informal mutual consent of the three governments concerned. Such officers, therefore, are not in the opinion of the Department, diplomatic or consular officers of the United States.

The Second Assistant Secretary of State (Adee) to Messrs. Dennis and Buhler, Apr. 30, 1920, MS. Department of State, file 081.62/402.

Section 5 of the act approved Mar. 3, 1921 (the Nolan act), extending temporarily the time for filing applications for letters patent, provides:

"That all applications for patent filed since August 1, 1914, in which the oath was executed before or authenticated by a consular officer, or other representative qualified to administer oaths, of a Government acting in the interest of the Government of the United States, shall have the same force and effect as if said oath had been executed by the applicant before a consular officer of the United States." 41 Stat. 1313, 1314.

The representative of a neutral power who assumes temporary charge of the archives of a belligerent power has rights, duties and liabilities similar to those appertaining to the representative of the power whose archives have been entrusted to him. Such representative has the duty to claim immunity of the archives from search and seizure and is under the obligation to take all reasonable measures to insure their safekeeping and preservation.

Archives

The Legal Adviser of the Department of State (Hackworth) to Murray Lipsky, July 28, 1932, MS. Department of State, file 701/203.

The local officials at Aleppo, stating that they acted upon instructions from Constantinople, in December 1914 broke the American consular seal on the door of the room containing archives of the British and French Consulates, of which the American Consul was in charge, and took the archives away. The Ambassador in Constantinople was instructed by the Department of State to request the immediate return of the archives and an explanation from the Sublime Porte and assurances that such violations of the seal of the United States would not be repeated. He was further instructed to use discretion in presenting this request, remembering that the Government of the United States used only moral persuasion in its efforts to protect other nationals and was not under an obligation to use force.

Secretary Bryan to the Embassy in Constantinople, telegram 110, Dec. 5, 1914, MS. Department of State, file 704.4187/18.

Several *notes verbales* were addressed by the American Embassy to the Sublime Porte after the entrance of Turkey into the World War of 1914-18 on the subject of violations by the Ottoman authorities of belligerent consular premises under American care. The actions of the authorities against which the Embassy protested usually consisted in breaking the seals affixed to the buildings by American consular officers, in searching the premises, and in some cases in removing the archives or other articles. The Turkish Minister of Foreign Affairs replied to certain of these notes on July 2, 1916, saying that in time of war inviolability of consulates, if respected as a measure of reciprocity between belligerents, was a matter of tolerance and an act of pure courtesy but not an obligation. It was asserted that the Turkish Government had intended to respect the archives of the belligerent consulates but that its own archives in enemy states had been violated in many instances. The American Chargé in Turkey replied that what the American Government complained of most seriously was the violation of the American consular seals.

Ambassador Morgenthau to Secretary Lansing, no. 826, Jan. 4, 1916, MS. Department of State, file 704.0067/16; Chargé Philip to Mr. Lansing, no. 1517, July 8, 1916, and the Acting Secretary of State (Polk) to Mr. Philip, telegram 3043, Oct. 18, 1916, *ibid.* file 367.116/511; 1916 For. Rel. Supp. 815, 822-823.

In 1914 rooms of the former British Consulate in Berlin were occupied by members of the staff of the American Embassy by verbal permission of the German Foreign Office for relief work for the British. On October 7, 1914 the rooms were raided by German police, certain members of the relief committee were arrested, and many papers were seized. On December 18 the American Ambassador sent a *note verbale* to the Foreign Office asking that any papers relating to British relief be returned to the Embassy so that it might complete its accounts of moneys received from the British Government for the relief of British subjects. This note was never answered, and there was no written apology. The Ambassador was asked as a favor, by an official of the German Foreign Office, to let the matter drop. In January 1915 some papers without any covering note or letter were returned.

Ambassador Gerard to Secretary Lansing, telegrams 3882 and 4104, May 12 and July 11, 1916, MS. Department of State, file 701.6211/372, /394; 1916 For. Rel. Supp. 820, 822.

RIGHT TO PROTECTION OF PERSON

§398

Section 255 of title 22 of the United States Code provides:

Every person who assaults, strikes, wounds, imprisons, or in any other manner offers violence to the person of an ambassador or a public minister, in violation of the law of nations, shall be imprisoned for not more than three years and fined, at the discretion of the court. (R.S. § 4062.)

In 1908 the Second Secretary of the American Legation in Habana, while dining in a restaurant, was assaulted by a Cuban citizen, who alleged that he had overheard the Secretary make derogatory remarks about him. The Secretary asserted that the assault was unwarranted and that he had given no provocation. The Department of State instructed the Legation that if the Cuban authorities wished to take judicial cognizance of the assault, it would seem proper for the Secretary to give them any appropriate information. It stated that if his testimony should be invited it was assumed that due regard would be paid to his diplomatic privilege and that his evidence would be given by deposition. It was added that if this course were followed the Department would authorize him to waive his diplomatic immunity from giving testimony before a court.

The testimony was given by deposition. Upon representations by the Legation the accused was tried by a Judge of Instruction rather than by a Correctional Court, in view of the Secretary's official position. As it appeared that the case might be returned to a minor court, the Legation inquired whether the Secretary "should waive his diplomatic privilege and be personally represented by counsel". The Department replied that it scarcely seemed correct to regard as a waiver of diplomatic immunity an authorization on the part of the Department that the Secretary should employ counsel to represent him. It expressed the opinion that he should employ counsel and, if necessary, become the prosecuting witness in any criminal proceedings necessary under Cuban law to bring his assailant to justice.

The criminal division of the Audiencia of Habana subsequently acquitted the accused of the offense with which he was charged, namely, that of violating an international right by attacking the person of a diplomatic representative, and remitted the case to a lower tribunal to be tried as one of assault and battery, unaffected by the diplomatic character of the plaintiff. The acquittal was based upon the ground that in order to constitute an assault upon the representative of a foreign power, as defined by article 152 of the Cuban Penal Code, it was necessary either that the assailant know the character of

the person whom he attacks or, knowing, must intend to offend that person's diplomatic immunity. It appeared that the accused neither knew the Secretary's diplomatic character nor intended to offend any diplomatic privileges or immunities which he possessed.

Secretary Root to Chargé Tarler, no. 208, Oct. 7, 1908, MS. Department of State, file 14963/14; Minister Morgan to Secretary Bacon, no. 887, Mar. 4, 1909, and the Acting Secretary of State (Wilson) to Mr. Morgan, no. 233, Mar. 15, 1909, *ibid.* /39-47; Mr. Morgan to Secretary Knox, no. 891, Mar. 9, 1909, *ibid.* /50; Mr. Morgan to Mr. Knox, no. 953, June 1, 1909, *ibid.* /63; 1909 For. Rel. 237-238.

On August 27, 1912 the American Chargé d'Affaires in Cuba was assaulted by a newspaper reporter in a hotel in Habana. Immediately, upon learning of the incident, the Department of State informed the Cuban Minister in Washington that it expected the Cuban Government to take prompt and energetic measures adequately to punish the offender. The reporter was subsequently sentenced to imprisonment of two years and six months.

Chargé Gibson to Secretary Knox, telegram of Aug. 27, 1912, and the Acting Secretary of State (Wilson) to the Cuban Minister (Martin-Rivero), no. 57, Aug. 28, 1912, MS. Department of State, file 123.G35/41; Mr. Gibson to Mr. Knox, telegram of Oct. 8, 1912, *ibid.* /53; 1912 For. Rel. 268-276.

The American Minister to Guatemala, on July 27, 1917, was stopped by a police officer in the city of Guatemala and taken to the barracks, where he was detained for a short time. The Minister immediately brought the matter to the attention of the Guatemalan Minister of Foreign Affairs. The President of Guatemala instructed the Foreign Minister to call personally on the American Minister and to express the regret of the President, the Government, and the Minister; to offer an apology; and to say that orders were to issue immediately to punish the officer responsible for the occurrence. The President also sent his chief of staff and his official secretary to convey his official and personal regrets and to extend his personal apology to the American Minister. The latter thereupon declared himself perfectly satisfied, and the Department of State expressed approval.

Minister Leavell to Secretary Lansing, no. 398, July 30, 1917, and Assistant Secretary Phillips to Mr. Leavell, no. 105, Aug. 21, 1917, MS. Department of State, file 123L481/40; 1917 For. Rel. 752, 753.

The Rumanian Minister was arrested in Russia on January 14, 1918. The Diplomatic Corps in Petrograd, with the American Ambassador as Dean, presented a note to Lenin expressing their indignation at the arrest, "affirming the unanimity of their sentiments on the subject of the violation of diplomatic immunities respected for centuries by all governments" and demanding the immediate release of the Minister.

The American Ambassador stated orally that the Corps would not discuss the causes or justification for the arrest but only the principle involved. The Minister was released on the following day. The Department of State approved the Ambassador's course "thoroughly".

Ambassador Francis to Secretary Lansing, telegrams 2230 and 2233, Jan. 14, 1918, MS. Department of State, files 861.00/949, 701.7161/1; same to same, telegram 2238, Jan. 15, 1918, *ibid.* /2; the Acting Secretary of State (Polk) to Mr. Francis, telegram 1999, Jan. 18, 1918, *ibid.* /1; 1918 For. Rel., Russia, vol. I, pp. 477, 478, 481.

In 1931 the Salvadoran Chargé d'Affaires in Washington was assaulted in his Legation by an intruder. The Department of State wrote to the Acting Minister of Foreign Affairs of El Salvador on June 18, 1931, expressing the regret of the Government of the United States at the incident and saying that an investigation was being made into all phases of the occurrence, that every effort was being made to apprehend and punish the guilty parties, and that every measure would be taken to extend adequate protection to the Chargé and to the Legation. As an act of courtesy and grace, it was added, the Government of the United States intended to defray the expenses to which the Chargé had been put as a result of the assault, and with that in view he was being requested to send the bills covering those expenses to the Department for payment.

The Secretary of State (Stimson) to the Acting Minister of Foreign Affairs of El Salvador (Lopez Jimenez), June 18, 1931, MS. Department of State, file 701.1611/214B.

In Jan. 1932 an indictment was filed charging W. H. Bedell with house-breaking, larceny, and assault with a dangerous weapon (on the Chargé). Bedell was arrested in June. A *nolle prosequi*, however, was subsequently entered in the case as there was insufficient evidence with which to proceed. The Assistant Attorney General (McMahon) to the Secretary of State (Hull), June 26, 1932, MS. Department of State, file 701.1611/320.

On January 17, 1932 an attack was made on the American Minister Resident in Ethiopia by Ethiopian police and members of a crowd which was threatening to harm his chauffeur. The Department of State instructed him that it did not object to his joining with the Diplomatic Corps in Addis Ababa in any urgent and reasonable demand which it might make for the prompt and adequate punishment of the offenders. It also instructed him to take independent action by seeking an audience with the Emperor and saying that the Government of the United States expected that prompt steps would be taken adequately to punish the guilty parties, that full publicity would be given the action taken, and that immediate and effective steps would be adopted to prevent similar occurrences. The police were subsequently found guilty by the Ethiopian authorities,

and each guilty person was sentenced to one year in prison and the payment of a fine, the sentence being publicly announced at the place of the attack. The Department informed the Minister that, if the public had been impressed by the seriousness of the incident, he might request the Emperor to have the fines remitted.

Minister Southard to Secretary Stimson, telegram 3, Jan. 22, 1932, MS. Department of State, file 123So8/261; Mr. Stimson to Mr. Southard, telegram 3, Jan. 22, 1932, *ibid.* /262; Mr. Southard to Mr. Stimson, telegrams 4 and 5, Jan. 26 and 28, 1932, *ibid.* /263, /266; Mr. Stimson to Mr. Southard, telegram 6, Feb. 1, 1932, *ibid.* /272.

In March 1935 Timothy Caines, a British subject employed as a messenger in the American Legation in Santo Domingo, was shot and beaten by a member of the Dominican Army. The American Minister addressed a note to the Dominican Secretary of State for Foreign Affairs requesting a prompt investigation. The Department of State informed the Minister that as Caines was a British subject the Government of the United States could not present a claim on his behalf but that since he was connected with the American Legation the case assumed a serious aspect which could not be overlooked by the Government of the United States. The Minister was instructed to address a further note to the Dominican Secretary of State for Foreign Affairs saying that the Government of the United States confidently expected that on the completion of the investigation action commensurate with the seriousness of the offense would be taken immediately against those responsible for the outrage. The person guilty of the assault was removed from the Army and was sentenced by a Dominican court.

Minister Schoenfeld to Secretary Hull, no. 2334, Mar. 29, 1935, and Mr. Hull to Mr. Schoenfeld, telegram 6, Apr. 11, 1935, MS. Department of State, file 124.393/118; the Acting Secretary of State for Foreign Affairs (Peynado) to Mr. Schoenfeld, May 28, 1935 (enclosure in despatch 2546 from the Legation at Santo Domingo, May 28, 1935), *ibid.* /141.

In 1931 a delegation of foreign-born American citizens visited Washington and requested an interview with the Secretary of State for the specific purpose of discussing with him the charges which they had previously made against the Ambassador of their country of origin in Washington. The Secretary of State refused to receive them, pointing out that it "would be highly improper for the Secretary of State to conduct a public hearing on charges brought against the accredited representative of a friendly Government".

The Acting Chief of the Division of Western European Affairs (Boal) to L. C. Schwarz, Mar. 16, 1931, MS. Department of State, file 811.00F Fama, Charles/28 7/20.

RIGHT TO PROTECTION OF PROPERTY . . .

§399

In the case of *Frend et al. v. United States*, the United States Court of Appeals for the District of Columbia upheld the validity of the joint resolution of Congress approved February 15, 1938, making it unlawful to display within 500 feet of an embassy, legation, or consulate in the District of Columbia any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or to bring into public disrepute its political, social, or economic acts or views, or to intimidate, coerce, harass, or bring into public disrepute any diplomatic or consular representative; or to congregate within 500 feet of any embassy, legation, or consulate and refuse to disperse after being ordered to do so by the police authorities of the District. 52 Stat. 30. The court said:

. . . The law of nations, therefore, requires every government to take all reasonable precautions to prevent the doing of the things which the resolution makes unlawful. The rule arises out of the necessity of the protection of nations in their intercourse with each other, and imposes on the Government of the United States responsibility to foreign nations for all violations by the United States of their international obligations. *United States v. Arjona*, 120 U.S. 479, 483-485, 7 S. Ct. 628, 30 L. Ed. 728. This responsibility includes the duty of protecting the residence of an ambassador or minister against invasion as well as against any other act tending to disturb the peace or dignity of the mission or of the member of a mission.

The resolution, interpreted in the light of its purpose and according to the limitations of the Constitution, places no restriction upon speech or assembly except to the extent that they may constitute offensive public demonstrations calculated to arouse passions and resentments in those governments with which we have official relations, and then only when such offensive conduct is committed upon the public streets immediately adjacent to embassies, legations, consulates, and other buildings used for official purposes by such governments. These are reasonable and proper restrictions. In them there is no abridgement of the right of speech or of assembly or of any other constitutional right of the citizen.

100 F. (2d) 691, 693 (1938); certiorari denied, 306 U.S. 640 (1939).

For a collection of authorities on protection of premises, see the comment in the Harvard draft convention on "Diplomatic Privileges and Immunities", 26 A.J.I.L. Supp. (1932) 51.

The Polish Legation inquired of the Department of State in 1925 whether, under the laws of the District of Columbia, a foreign diplomatic representative could request the services of the police of the District to evict forcibly a person occupying living quarters in the Legation and refusing to vacate them at the request of the chief of mission. The Department replied by quoting the following communication from the Commissioners of the District of Columbia:

Under the system of laws of the District of Columbia the aid of the police could not be properly sought in this matter, which is of civil character. If, however, the Legation, through its agents, should seek to evict the person and use only such sufficient force as is necessary for the purpose, on the theory that the janitor was a trespasser, a policeman could be requested to be present to see that no breach of the peace occurred. However, it is believed that it would be more expedient for the Legation to consult local counsel as to its powers and rights in the matter.

The Department of State to the Polish Legation, Oct. 27, 1925, MS. Department of State, file 701.60C11/120.

In April 1930 three trucks containing personal and household effects of the American Minister to Persia were fired upon by bandits in Persia, and a part of the Minister's effects were either stolen or destroyed. On July 1, 1930 the Department of State instructed the Minister that he might inform the Persian Government that the Government of the United States was surprised to learn that the Persian Government was disposed to view the incident with scant concern and that it had been believed that that Government and people would accord the representative all the courtesy for which they were renowned and would scrupulously protect his person as well as his property. The Persian Government agreed, without officially recognizing responsibility, fully to compensate the American Minister, and this was done on March 3, 1931.

Minister Hart to Secretary Stimson, no. 76, May 2, 1930, MS. Department of State, file 123H255/77; Mr. Stimson to Mr. Hart, telegram 29, July 1, 1930, *ibid.* /78a; Mr. Hart to Mr. Stimson, telegrams 42 and 11, Aug. 5, 1930 and Mar. 3, 1931, *ibid.* /87, /112.

DIPLOMATIC IMMUNITIES

DIPLOMATIC IMMUNITIES

EXEMPTION FROM JUDICIAL PROCESS

IN GENERAL

§400

In a letter of March 16, 1906 to the Secretary of Commerce and Labor, Secretary Root said:

There are many and various reasons why diplomatic agents, whether accredited or not to the United States, should be exempt from the operation of the municipal law at [sic] this country. The first and fundamental reason is the fact that diplomatic agents are universally exempt by well recognized usage incorporated into the Common law of nations, and this nation, bound as it is to observe International Law in its municipal as well as its foreign policy, cannot, if it would, vary a law common to all. If such a law were passed by the proper authority such law would be binding upon Government, courts and people within our jurisdiction, but foreign nations would not be bound to admit its validity in a case properly involving their rights and privileges or duties and obligations. If authority be needed for this assertion it will be found alike in decisions of courts and in works of authority.

The reason of the immunity of diplomatic agents is clear, namely: that Governments may not be hampered in their foreign relations by the arrest or forcible prevention of the exercise of a duty in the person of a governmental agent or representative. If such agent be offensive and his conduct is unacceptable to the accredited nation it is proper to request his recall; if the request be not honored he may be in extreme cases escorted to the boundary and thus removed from the country. And rightly, because self-preservation is a matter peculiarly within the province of the injured state, without which its existence is insecure. Of this fact it must be the sole judge: it cannot delegate this discretion or right to any nation however friendly or competent. It likewise follows from the necessity of the case, that the diplomatic agent must have full access to the accrediting state, else he cannot enter upon the performance of his specific duty, and it is equally clear that he must be permitted to return to the home country in the fulfillment of official duty. As to the means best fitted to fulfil these duties the agent must necessarily judge: and of the time required in entering and departing, as well as in the delay necessary to wind up the duties of office after recall, he must likewise judge.

Reasons for
immunity

For these universally accepted principles no authority need be cited.

It would appear therefore abundantly clear that the immunities of diplomatic agents exist by virtue of the law of nations which

is a part of the law of the land, and that such provisions [sections 4062-4065 of the Revised Statutes] are merely declarative and punitive in their nature.

MS. Department of State, 288 Domestic Letters 554, 555, 557, 559.

Sections 252 through 254 of title 22 of the United States Code provide:

§252. *Suits against ministers and their domestics prohibited.* Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any ambassador or public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void. (R.S. §4063.)

§253. *Penalty for wrongful suit.* Whenever any writ or process is sued out in violation of section 252 of this title, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the court. (R.S. §4064.)

§254. *Exceptions as to suits against servants, etc., of minister; listing servants.* Sections 252 and 253 of this title shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States in the service of an ambassador or a public minister and the process is founded upon a debt contracted before he entered upon such service; nor shall section 253 of this title apply to any case where the person against whom the process is issued is a domestic servant of an ambassador or a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office. All persons shall have resort to the list of names so posted in the marshal's office and may take copies without fee. (R.S. §§ 4065, 4066.)

" . . . in the United States a foreign diplomatic representative is accorded all the immunities, privileges, and exemptions to which he may be entitled by international law. He is immune from the criminal and civil jurisdiction of the United States and cannot be sued, arrested, or punished by the laws thereof; he is exempt from testifying before any tribunal whatever; his dwelling house and goods and the archives of his mission cannot be entered, searched, or detained under process of law or by the local authorities; but real or personal property held by him aside from that which pertains to him as a public minister is subject to the local laws. The personal immunity of a diplomatic representative extends to

his household, and especially to his secretaries. Generally his servants share therein, but this is not always the case when they are citizens of the United States. The statutes on the subject are contained in Sections 4062-4066 of the Revised Statutes. . . ." Secretary Knox to the Spanish Minister (Riaño y Gayangos), no. 97, Jan. 18, 1912, MS. Department of State, file 701.0011/3.

The immunity [under the law of the United States] from criminal prosecution and civil process and from the obligation to testify is considered to apply to a foreign diplomatic representative, his secretaries, attachés, including military, naval and commercial attachés, employees, members of his household, including his family, and domestic servants. Employees or servants of diplomatic missions are entitled to the immunities in question regardless of their nationality with the exception of one case provided for in Section 4065 of the Revised Statutes—namely where process is founded upon a debt contracted before the employee or servant [a citizen or inhabitant of the United States] entered the service of the mission.

The Under Secretary of State (Grew) to the German Chargé d'Affaires ad interim (Dieckhoff), July 16, 1920, MS. Department of State, file 701.05/126.

For a collection of authorities on exemption from jurisdiction, see the comment in the Harvard draft convention on "Diplomatic Privileges and Immunities", 26 A.J.I.L. Supp. (1932) 99.

In 1926 the League of Nations Committee of Experts for the Progressive Codification of International Law, through the Secretary General of the League, submitted to the various governments a *questionnaire* on diplomatic privileges and immunities. This was done on the basis of a report submitted by a subcommittee consisting of Professor Diena, Professor of International Law at the University of Pavia, as *rapporteur*, and Dr. Mastny, Czechoslovak Minister at Rome. For the *questionnaire*, the replies, and the reports of the subcommittee and the committee, see League of Nations pub. C.196.M.70.1927.V [1927.V.1]. See also 20 A.J.I.L. Spec. Supp. (1928) 148; 22 *idem* (1928) 13.

CRIMINAL PROCESS

§401

In November 1935 the Iranian Minister, while driving through Elkton, Maryland, was stopped by police and his chauffeur was charged with violating the traffic regulations. The Minister and his chauffeur were arrested and taken before a justice of the peace, the Minister himself being put in handcuffs. The justice dismissed the charges, suspended the fine imposed upon the chauffeur, but compelled him to pay 75 cents as costs. The Minister protested to the Department of State. The Secretary of State replied that he had been informed by the Governor of Maryland that the offending police officers had been tried and fined and were no longer in the public service. The Governor himself expressed apologies for the incident. The Secretary

also expressed regret on the part of the Government of the United States that the Minister had been subjected to discourteous treatment and pointed out that according to the available information the incident would not have occurred had the chauffeur observed the regulations. The Secretary concluded:

In this connection I may state that this Government has at all times impressed upon its own diplomatic officers in foreign countries that the enjoyment of diplomatic immunity imposes upon them the obligation and responsibility of according scrupulous regard to the laws and regulations, both national and local, of the countries to which they are accredited. I feel confident that the Iranian Government will share the view that this Government is justified in expecting that foreign diplomatic officers accredited to the United States will manifest a similar regard for the laws and regulations in force in this country.

Secretary Hull to Minister Djalal, Dec. 6, 1935, MS. Department of State, file 701.9111/455; Department of State, XIII *Press Releases*, weekly issue 323, pp. 497-498 (Dec. 6, 1935).

A former Minister of El Salvador to Great Britain, while in transit in the United States, was detained by local authorities in Maryland and fined for an alleged violation of traffic regulations. No action was taken by the Department of State, since the Commissioner of Motor Vehicles ordered a refund of the fine and stated that he had been informed by the Assistant Attorney General of the State of Maryland that the arrest was improper.

Minister Leiva to Secretary Stimson, Mar. 18, 1932, MS. Department of State, file 701.1641/2; the Maryland Commissioner of Motor Vehicles (Baughman) to the Office Auditor (McGeeney), Apr. 4, 1932, *ibid.* /5.

The Department of State wrote to the Attorney General on August 4, 1938 with regard to the suggested inclusion of the Spanish Ambassador to Mexico in indictments against certain persons involved in the illegal exportation of airplanes from the United States to Mexico in violation of the Neutrality Act, saying:

Just what provisions [*privileges*] or immunities shall be accorded a diplomatic officer in a country other than his country of origin or the country to the government of which he is accredited would seem to be a matter not precisely defined by international law. In general, the question has been determined by the individual country concerned and its decision has been governed by the particular circumstances surrounding the presence therein of the diplomatic officer.

The Department recommended that the Ambassador be not named as a defendant in the indictment but stated that it saw no objection to a reference to him in the indictment if the United States Attorney believed it essential to the successful prosecution of the other guilty parties.

Counselor Moore to Attorney General Cummings, Aug. 4, 1938, MS. Department of State, file 711.00111 Unlawful Shipments/227 (Fritz Bieler, et al.)

. . . an American Ambassador while in the United States is not entitled to immunity from arrest.

The Legal Adviser of the Department of State (Hackworth) to Miss Jean Soper, Dec. 13, 1935, MS. Department of State, file 121.41/61.

Wolf von Igel, attached to the German Embassy, was indicted with others on April 17, 1916 in New York for violation of the Criminal Code of the United States for beginning, setting on foot, and providing and preparing the means for military enterprises. He was released on bail on the day of his arrest (Apr. 18). (Three other indictments were filed against him and others on subsequent dates.) According to the German Ambassador, Mr. von Igel came to the United States as secretary to the military attaché on August 27, 1914 and prior to his arrest had been notified to the Department of State as attached to the German Embassy and entrusted with the continuance of the office of the former military attaché in New York. His name had been placed by the Department on the list of the officials of the Embassy. On April 18 the Ambassador asked that orders be issued for his immediate release and that papers seized when he was arrested, which were lying on his table and which allegedly belonged to the Embassy, be sealed and returned to the Ambassador immediately and not read or copied by any American official. The Secretary of State wrote the Ambassador on April 24 that the crimes with which Von Igel was charged were so serious, certain of them having been directed against the Government of the United States and liable to endanger its peace with other nations, that he felt sure that the German Government, even if it had the right under international law to interpose the plea of diplomatic immunity, would not so interfere with the course of justice or permit its privileges to shield the perpetrator of such crimes from just punishment. He said that he did not think that the German Government could legally claim diplomatic immunity for him since the nature of the crimes with which he was charged was so grave and since the crimes were committed before he was notified to the Department as an attaché of the German Embassy. He stated further that he was not convinced that the papers in question were improperly seized, saying, "Docu-

ments obtain an acquired immunity from the fact that among other things they are under official seal, that they are on Embassy premises, or that they are in the actual possession of a person entitled to diplomatic immunity." He declared that in this case none of the papers was under seal, that the room in which they were found was rented by a private person for an advertising bureau and was not part of the Embassy premises, and that they did not appear to have been in the actual possession of Von Igel. However, he stated that, although in the opinion of the Government of the United States it might legally retain the documents seized, at least temporarily for use as evidence, the Government was not disposed to insist strictly on its rights and that as a matter of comity and good-will the seized documents would be submitted to him for his inspection and that those which he declared to be part of the official correspondence of his Embassy would be delivered to him to be returned to the Embassy's archives.

The Ambassador wrote again to the Secretary on April 27 expressing his individual views on the case, in the absence of instructions from his Government. He said that the crime was charged as committed on August 1, 1914 when Von Igel was in Germany and that it seemed clear under universally accepted rules of international law that he was immune from criminal prosecution or arrest for any offense committed by him while in Germany or after his arrival in the United States. He stated that the lease of the room where the arrest was made was in Von Igel's name and that the papers had been on the day of the arrest in a safe in the office bearing the seal of the Embassy and had been only temporarily taken from the safe. He declared that the seizure of the papers could not be sustained as legal and added that in the absence of instructions from his Government he could not accede to the suggestion that he inspect the documents and pick out those which he considered official. He stated also that punishment for any crime committed by an official under the protection of the Embassy should be meted out by his own Government. On May 27 the Ambassador informed the Secretary that he had been instructed by his Government that, since Von Igel had been recognized as a member of the German Embassy, his diplomatic immunity should have been respected and that therefore the documents in his physical possession were inviolable. The Secretary replied that the office where Von Igel was arrested had been leased by him in his private capacity "to be used . . . as offices for the transaction of his business as an advertising agent" and that he had concluded that the Government of the United States was entitled to retain the papers in question for use in the legal proceedings which had been brought in an effort to prevent the use of

American territory as a base of hostile operations. He added that the room in which the arrest occurred had no connection with the Embassy at the time and so far as the Department was informed had not been used by it in the performance of its diplomatic functions.

The Ambassador took the position that if papers could be seized from the possession of an accredited member of the diplomatic staff and the seizure thereafter justified by an inspection of their contents, all diplomatic immunity would speedily come to an end.

Mr. von Igel was still under indictment when he returned to Germany with other officials after the severance of relations between the United States and Germany on February 3, 1917, but his bond was canceled on February 13, 1917, leaving him paroled on his own recognizance.

Count von Bernstorff to Secretary Lansing, Apr. 18, 1916, MS. Department of State, file 701.6211/364, /366; Mr. Lansing to Count von Bernstorff, Apr. 24, 1916, *ibid.* /368; Count von Bernstorff to Mr. Lansing, Apr. 27 and May 27, 1916, *ibid.* /651, /652; Mr. Lansing to Count von Bernstorff, June 16, 1916, *ibid.* /583a; Count von Bernstorff to Mr. Lansing, June 19, 1916, *ibid.* /386; 1916 For. Rel. Supp. 808-815.

In 1927 the Attorney General inquired of the Secretary of State whether in the view of his Department the cases against Von Igel should be pushed for trial or dismissed. The Secretary expressed the opinion that it would be preferable to dismiss the cases since it was his understanding that Von Igel had returned to Germany and as far as was known was not at the time in the United States. It seemed probable, he said, that no practical purpose could be subserved by maintaining the indictments in force. Secretary Kellogg to the Attorney General, June 30, 1927, MS. Department of State, file 701.6211/676.

The German Ambassador protested to the Department of State in 1916 against the issuance of a subpoena to the Chase National Bank to produce a copy of the account of Heinrich Albert, commercial attaché to his Embassy, on the ground that this was an invasion of diplomatic privilege. The Department stated that it was informed by the Department of Justice that at the time the subpoena was issued and served it was not known from whose account certain money had gone into the account of Wolf von Igel, attached to the German Embassy and then under indictment, and that, as soon as it developed that the money in question came from the account of Mr. Albert, the matter was dropped and the information obtained had never been used in any way. Secretary Lansing to Count von Bernstorff, no. 1966, June 13, 1916, MS. Department of State, file 701.6211/377.

In August 1919 the assistant military attaché to the American Legation in Switzerland ran over and killed two people near Rolle, Canton of Vaud. The Department of State, on November 21, 1919, instructed the American Legation in Switzerland that, in the opinion of the Solicitor for the Department, while the attaché was immune from judicial process in that country so long as he was accredited to it as assistant military attaché and for a reasonable time subsequent

to his recall, if he should continue to reside there after the expiration of such reasonable time it was probable that he could not claim immunity from judicial process in that country. The Department stated that it had been informed by the War Department that because of delays incident to demobilization the person in question had not been relieved as assistant military attaché and that he should be considered as occupying that position until he was actually discharged. In the circumstances, it was said, the attaché (who had gone to Paris) was entitled to return to Switzerland and to enjoy diplomatic immunity while accredited to the Swiss Government.

On November 12, 1919 the Swiss Political Department, Division of Foreign Affairs, informed the American Minister that the Attorney General of the Canton of Vaud, after studying the conclusions of the penal investigation occasioned by the accident, had arrived at the conclusion that a charge of homicide through recklessness ought to be brought against the attaché. The Political Department expressed the opinion that "in the United States as well as in Switzerland, where the juridical principle of equality before the law is uncontested, it must be considered inadmissible that the course of justice should be stopped on account of a privilege". The doctrine of international penal law, it was stated, was unanimous in making the attaché liable to trial before the courts of the Canton of Vaud, and only the right of extritoriality prevented the action of justice in his case. It was suggested that the Federal Council might request the Department of State to agree to a renunciation of the attaché's immunity. However, the note continued, the Swiss Government believed that it might refrain from using that right and might hand over to the American Government the task of submitting to the American judicial authorities the facts involved in the accident.

On December 30, 1919 the War Department instructed the Commanding General of the American Forces in France to convene a court of inquiry to investigate the accident. The attaché was subsequently acquitted by an American military court martial.

Secretary Lansing to the Legation in Switzerland, telegram 4812, Nov. 21, 1919, MS. Department of State, file 121.54/1626; Mr. Calonder to Minister Stovall, Nov. 12, 1919 (enclosure in despatch 8660 from the American Legation at Bern, Nov. 22, 1919), *ibid.* /1672; the Secretary of War (Baker) to Mr. Lansing, Jan. 7, 1920, *ibid.* /1703; Secretary Colby to the Legation at Bern, telegram 195, May 12, 1920, *ibid.* /1649.

Son of
diplomatic
officer

The son of the Commercial Counselor of the British Embassy was served with a summons by the clerk of the First District Court of Barnstable, Massachusetts, to appear in court to answer a charge of operating a motor vehicle without registration and insurance. The Department of State telegraphed to the Governor of Massachusetts on

August 16, 1930, asking that the attention of the chief of police be called to sections 4062-4064 of the Revised Statutes and that the summons be withdrawn. The matter was subsequently disposed of satisfactorily by the clerk of the court.

Acting Secretary Castle to Governor Allen, telegram of Aug. 16, 1930, MS. Department of State, file 701.4111/719A; F. O. P. Carlson to Mr. Castle, telegram of Aug. 19, 1930, *ibid.* /721.

The son of a foreign minister in Washington, as a member of the latter's household, is immune from the process of law in accordance with title 22, sections 251-255, of the United States Code and accordingly may not be penalized for traffic violations.

The Chief of the Division of Protocol (Summerlin) to L. C. Day, of the Montgomery County Police, Oct. 7, 1938, MS. Department of State, file 701.1811/222.

The Department of State informed the United States Marshal in the District of Columbia in 1930 that, since the name of the son of a foreign military attaché had not been registered in the Department of State and transmitted to the Marshal and since he did not appear to be in the service of the Ambassador, there seemed to be no reason why process should not be served on him, provided it was not done on the premises of the Embassy or of the military attaché.

The Assistant Secretary of State (White) to E. C. Snyder, May 23, 1930, MS. Department of State, file 701.2311/308. See also the Assistant Secretary of State (Castle) to the Attorney General, May 9, 1927, *ibid.* 701.41d11/49.

The Second Secretary of the Turkish Embassy was arrested in 1928 in New Jersey following a collision between his automobile and that of a resident of Trenton. The matter was brought to the attention of the Governor of New Jersey by the Department of State, and he replied on September 6, 1928 offering to the Turkish Ambassador profound regrets and apologies for the occurrence.

Governor Moore to the Under Secretary, Sept. 6, 1928, MS. Department of State, file 701.6711/248.

In 1927 a clerk employed by the American Legation in Switzerland Clerks trespassed on certain property and was requested to pay a fine. On the assumption that the clerk was an American national, the Department of State instructed the Minister as follows:

. . . Under the generally accepted principles of international law, the immunities to which a Chief of Mission is entitled are shared by his retinue or suite which includes clerks employed by the diplomatic mission. In view of this principle under which a member of the suite enjoys immunity from the local

civil and criminal jurisdiction, the Department does not understand the attitude of the Swiss authorities in apparently holding that the clerk in question is subject to the local police jurisdiction. It is regretted, therefore, that instead of making a demand directly upon the clerk the Swiss authorities did not take up the matter through your Legation.

The Minister was instructed to call the case to the attention of the Swiss authorities and to express the hope that the charges against the clerk would be dropped since the Legation had made apologies for the trespass and the individual upon whose property the trespass occurred had no desire to press the case; also that he might point out with reference to sections 4063 and 4064 of the Revised Statutes that—

it is the practice of this Government to regard as included within the protection of these Statutes clerks employed in foreign missions at this capital.

Assistant Secretary Castle to Minister Wilson, no. 24, July 29, 1927, MS. Department of State, file 701.05/138.

In 1935 the chief clerk of the American Legation in Venezuela was arrested and detained on the charge of exceeding the speed-limit. The Department of State instructed the Minister in Caracas to inform the Foreign Office as follows:

Under well established principles of international law, members of a Legation staff who are not nationals of the state to which the mission is accredited are generally granted immunity from arrest. Statutory provisions to give effect to this immunity are contained in the laws of many nations. In the United States the provisions are contained in the United States Code, Title 22, Sections 252-254.

No definite evidence appears to have been presented establishing that Mr. Zirkle had committed any serious offense against Venezuelan laws, requiring imprisonment and refusal to release him when offered payment of fine imposed. The treatment meted out to him is considered by my Government to be unjust, and unwarranted by his action, and is wholly contrary to established usage and to the treatment accorded by the United States, under such circumstances, to persons in a similar position attached to the Venezuelan legation at Washington.

In a note of September 5, 1936 the Venezuelan Minister of Foreign Affairs said that he had suggested that recommendations be made to the authorities charged with the direction and control of traffic that they exercise the greatest respect for the privileges enjoyed by the members of the diplomatic missions accredited near the Government of Venezuela. He expressed the hope that the persons enjoying

these privileges would contribute on their part to an avoidance of incidents such as this one, which was deplored, by a strict observance of the traffic laws and regulations.

Assistant Secretary Carr to Minister Nicholson, no. 37, Dec. 9, 1935, MS. Department of State, file 123 Zirkle, Vernon B./80; Mr. Nicholson to Secretary Hull, no. 452, Sept. 10, 1936, *ibid.* /84.

In May 1924 an American chief petty officer, George McCarthy, employed by the American High Commission in Turkey, who was on watch in civilian dress at a former naval base then used as a storehouse by the High Commission, accidentally dropped his revolver, which discharged and wounded a Turkish passer-by. McCarthy was arrested and taken to jail. The Department of State instructed the High Commission to point out to the Turkish authorities that McCarthy was a citizen of the United States employed by the American Government, that he was considered a member of the mission staff, and that he was performing duties under the instructions of the Chief of Mission when the accident occurred; and to say that under similar circumstances the Government of the United States would be disposed to recognize diplomatic immunity on the part of a member of the Turkish Ambassador's suite in Washington. McCarthy was never brought to trial since he subsequently forfeited the bail on which he had been released, and left Turkey.

The Acting Secretary of State (Grew) to the United States High Commission at Constantinople, telegram of June 17, 1924, MS. Department of State, file 367.1121 McCarthy, George W.

The Attorney General of Maryland inquired whether the chauffeur Chauffeur for a foreign minister could be arrested for violating the provisions of the State motor-vehicle law of Maryland in the following cases: (1) When the foreign minister was in the car; (2) when the foreign minister was not in the car and the chauffeur was operating it alone, (a) on business for the foreign minister, (b) for his own pleasure. The Department replied that—

in all the above situations the chauffeur of a foreign minister should be regarded as immune from arrest irrespective of the statutory provisions which have been enacted in the United States and which seem to bear upon the matter. However, after the termination of such employment, the chauffeur of a foreign minister would be subject to arrest for a violation of the law committed during the time of his employment.

The authorities upon international law have attached great importance to the immunity from local jurisdiction of the vehicular equipage of foreign diplomatic representatives, as essential for their freedom of movement, which constitutes such a large

part of their independence in the State where they represent their Governments. Therefore, the Department considers, that irrespective of statutory enactments, the latitude in this respect granted by the generally accepted international usage should govern the action of the authorities in the United States in dealing with the servants of foreign diplomatic representatives whose duty it is to convey their employers from place to place. It is recognized that some inconvenience may in given cases result from an exercise of this indulgence but presumably any dereliction committed by a chauffeur of a foreign minister, if called to the latter's attention through the Department, would result in a satisfactory adjustment of the matter.

Counselor Polk to Attorney General Ritchie, Aug. 10, 1916, MS. Department of State, file 701.05/75.

The Commissioners of the District of Columbia in May 1908 called to the attention of the Department of State the unlawful rate of speed at which a taxicab occupied by the Swedish Chargé d'Affaires had been operated on May 23. The Department replied that it saw no reason why the case against the driver of the taxicab in question should not be allowed to take its ordinary course in the courts of the District.

Secretary Root to the Commissioners of the District of Columbia, June 10, 1908, MS. Department of State, file 3771/11-12.

In 1918 a fine for speeding was imposed by the authorities of the State of Maryland on the driver of a car in which the Counselor of the Argentine Embassy was riding. The Governor of Maryland informed the Department of State that the Counselor was not in his own automobile, that he did not have his own chauffeur, and that, in the opinion of the Commissioner of Motor Vehicles in Maryland, the driver of a hired taxi was not the agent of the person or persons conveyed. The Governor added that he realized that the driver could become the agent of the occupant of the taxi and offered to have the fine returned to the Counselor if the Secretary of State preferred. The latter replied that he would be glad if the fine were returned, since his construction of sections 4063 and 4064 of the Revised Statutes of the United States was "that a diplomatic officer of a foreign country should not be arrested or hindered by the arrest of the man acting as his chauffeur for the moment, because such action might interfere with his diplomatic duty".

Secretary Lansing to the Governor of Maryland, Oct. 4, 1918, MS. Department of State, file 701.9511/154.

In March 1907 the chauffeur of the Austro-Hungarian Ambassador was arrested at Glen Echo, Maryland, charged with not having a license num-

ber for Maryland displayed on the front of his car. The Solicitor for the Department of State expressed the following opinion:

"Even although the penal provisions of R.S. 4064 [providing a penalty for the issuance of writ or process against ambassadors, etc.] do not apply on account of non-registry according to the requirements of R.S. 4065 [excepting cases of writs or process issued against servants of ambassadors, when the names of such servants had not been registered in the Department of State] and possibly on account of the failure of the Glen Echo authorities to violate the language of the statute through the issuance of process, the United States will not scruple to punish administratively any and every person within the reach of the federal authorities for any interference with a domestic servant of a foreign ambassador even although unregistered.

"To sum up the remedies provided by the federal statutes in the present instance:

"(1) The warrant, if any, which was issued against Mahoney [the chauffeur in question] is void for all purposes and can be set aside by a proper proceeding. See, on this point, *United States v. Joseph Lafontaine*, 4 Cranch 178, in which an indictment against Lafontaine, who was a cook in the employ of Baron Stackelberg, chargé d'affaires of His Majesty the King of Sweden and Norway, was quashed by the court according to the provisions of the statute.

"(2) Although, for the reasons already given, namely, the non-registry of Mahoney with the Department and with the marshal of the District of Columbia, the penal provisions of Section 4064 are not applicable, it is believed that Mahoney has his common-law remedies for false imprisonment in the State courts, with an ultimate appeal to the federal courts in case his federal rights are disregarded, for any imprisonment which he may suffer under any warrant which the authorities of Glen Echo may issue.

"(3) If Mahoney is properly registered according to Section 4065, not only will any future warrant be invalid according to Section 4063, but the penalties of Section 4064 will attach and all parties concerned in suing out or executing such warrant will be liable to imprisonment for not more than three years and to be fined in the discretion of the court."

The matter was amicably settled by negotiations between the United States attorney for the District of Maryland and the local officers responsible for the arrest, who stated that they were desirous of avoiding any action which would interfere in any way with the diplomatic privileges of foreign representatives and that if these representatives would indicate their diplomatic status they would in no wise be physically interfered with.

Opinion of the Solicitor for the Department of State, Apr. 30, 1907, and the Attorney General (Bonaparte) to the Secretary of State (Root), June 7, 1907, MS. Department of State, file 5510/4, /10-11.

For other cases in which the Department of State has called the attention of State authorities to the immunity from arrest or summons of chauffeurs employed by embassies or legations, see: Secretary Lansing to the Governor of Maryland, Sept. 20, 1918, MS. Department of State, file 701.8511/155 (chauffeur of Counselor of Argentine Embassy, imposed fine subsequently remitted); Secretary Stimson to the Governor of Maryland, Nov. 17, 1932, *ibid.* 701.4111/799 (chauffeur of British Embassy); Secretary Hughes to the Governor of Delaware, May 1, 1924, *ibid.* 701.5511/196 (chauffeur of the Belgian Ambassador); Assistant Secretary Wright to Baron de

Cartier de Marchienne, June 11, 1924, *ibid.* /197 (chauffeur of Belgian Ambassador, deposit for fine and court expenses subsequently remitted).

Nationality

In January 1924 the Czechoslovak Foreign Office informed the American Legation that chauffeurs in the employ of diplomatic missions who were of Czechoslovak nationality and who violated automobile regulations would be rigorously prosecuted. The Department of State instructed the Minister in Prague:

In stating that a chauffeur of Czechoslovak nationality employed by the American Military Attaché in Vienna was entitled to immunity, the Legation in Vienna was recently instructed to inform the Foreign Office that when the Austrian Ambassador's chauffeur, William F. Mahoney, was arrested at Glen Echo, Maryland, in 1907 on a charge of violating the automobile regulations of Maryland, the Department in holding that the chauffeur was entitled to immunity did not raise any question as to his nationality.

You may . . . inform the Foreign Office that since this Government in according immunity to employees, including chauffeurs, of foreign diplomatic officers in this country, has not raised any question as to the nationality of such employees, the Department considers that it would on the basis of reciprocity be warranted in claiming immunity for chauffeurs in the permanent employ of your mission irrespective of their nationality, such immunity being necessary for the convenience of the members of a diplomatic mission in their movements in the country in which they are stationed. You may add that this Government would, nevertheless, be disposed to give due consideration to the question of waiving immunity in individual cases in which persons employed by your mission may be charged with violating Czechoslovak laws or regulations.

Secretary Hughes to Minister Einstein, no. 189, June 27, 1924, MS. Department of State, file 701.05/110.

In response to a request for instructions as to the diplomatic immunities of servants and other employees of foreign missions, the Department of State in 1925 remarked that the authorities on international law were not in accord in holding that employees of a foreign mission who are nationals of the receiving state may rightfully claim immunity from local jurisdiction in civil and criminal cases. It said:

. . . The following rule as given in Halleck's work on international law appears to have been in general followed by this Government in cases involving immunity of servants or other employees of foreign diplomatic missions from the local jurisdiction:

"It was at one time contended that the subjects of the State to which a public minister is accredited, do not participate in his rights of ex-territoriality, but are justiciable by the tribunals

of their country. But the better opinion seems to be that, although such State may very properly prohibit its subjects from becoming the employees or servants of a foreign minister, if it do not so prohibit them, they are, while so employed, to be considered without the limits of its jurisdiction. (Vol. 1, page 331-3d Edition)."

It also pointed out that under section 4065 of the Revised Statutes of the United States an American citizen employed by a public minister is not denied the right to claim immunity unless the process is founded on a debt contracted before the employee entered the minister's service.

The Under Secretary of State (Grew) to the Chargé d'Affaires ad interim in Hungary (Matthews), no. 1002, Nov. 13, 1925, MS. Department of State, file 701/119.

In 1926 a fine was imposed by the Swiss authorities on the chauffeur of the American Minister for an alleged violation of speed regulations. The chauffeur was said to be a Swiss national. The Department of State instructed the Minister that—

the question whether immunity should be extended to the members of a mission who are subjects of the receiving State does not appear to have been definitely settled.

OPPENHEIM states (Volume 1, page 544) that it is a customary rule of international law that the receiving State must grant to all persons in the private service of the envoy and of the members of his Legation, *provided such persons are not subjects of the receiving State*, exemption from civil and criminal jurisdiction.

WOOLSEY states, on page 1421 of his work on international law, that the reasons for the exemption from the local jurisdiction in the case of servants, *especially of natives of the country*, whom the foreign Minister hires, are of little cogency, since, he states, others could be speedily found to take their places, but that this exemption is tolerably well established.

HYDE (Volume 1, page 755) makes the following statement:

"A servant, or other member of the unofficial staff of a mission who is not a national of the State of sojourn, appears to be increasingly regarded as sharing his master's immunity throughout the period of service; yet upon his discharge therefrom, to be subjected to the local law, and punishable, if need be, for criminal acts committed during the course of his employment."

As confirming the foregoing conclusions, reference may be made to the case of the German coachman of the French Embassy at Berlin who was fined sixty marks for a violation of a municipal regulation without any protest being made by the Embassy. (*Revue Générale de Droit International Public*, Volume 2, page 354, 1888). Reference may also be made to the case of the Italian coachman of the German Embassy in Rome, who, in 1881, was condemned to two months' imprisonment by an Italian court, and to the case of the Italian coachman of the Colombian Legation,

who was fined twenty lire by the authorities of Rome in 1894. (The same Revue, Volume 16, page 378). In the same journal there are cited two instances in which the chauffeurs of the American Embassies in London and in Rome were both held immune from the local jurisdiction, but no mention is made in the article in question to the nationality of these two domestics.

It would seem from the foregoing that it is not definitely established that as a general principle of international law a chauffeur in the employ of a foreign Minister would, in a case where the chauffeur is a citizen or subject of the country of the Minister's sojourn, be entitled to claim immunity from the local jurisdiction. It may be observed, however, that the rule as given by Halleck [quoted *ante*] appears to have been followed by this Government in the matter of according immunity to the servants of foreign diplomatic representatives in this country.

. . . In view of the lack of uniformity in the practice of States with respect to the granting of immunity from the local jurisdiction to employees of missions who are nationals of the receiving State, claim to immunity can hardly be asserted as a general principle of international law. Any representation on the subject would more properly be made on the basis of reciprocity and comity between friendly States.

You are consequently instructed to bring to the attention of the Swiss authorities the provisions of Sections 4063-4065 of the Revised Statutes of the United States, and to point out that American chauffeurs of foreign diplomatic officials in this country are not subject to penalties for the infraction of traffic regulations committed in the course of their employment; that this immunity is granted for the convenience of and as a courtesy to the foreign diplomatic missions; and that the Department considers that it is warranted in inquiring whether on the basis of reciprocity chauffeurs in the permanent employ of your mission irrespective of their nationality may not be accorded like immunity, the lack of which may greatly inconvenience the members of a diplomatic mission in their movement in the country in which they are stationed. You may add that this Government indulges the hope that, as a result of the foregoing assurances concerning the courtesies shown the Swiss Legation in this capital with respect to its employees, the Political Department will take the necessary steps to reciprocate. You will, of course, assure the Political Department that your chauffeur has strict instructions to comply at all times with the pertinent Swiss laws and regulations pertaining to automobiles.

Should the Swiss authorities find themselves unable to adopt the Department's suggestion, the Department will give consideration to the question of removing the names of any American employees of the Swiss Legation in this capital from the *List of Employees in the Embassies and Legations in Washington not printed in the Diplomatic List*.

Under Secretary Grew to Minister Gibson, no. 523, Oct. 2, 1926, MS. Department of State, file 701.05/130.

As a result of an automobile collision in which the car of the Counselor of the American Legation in Peiping was involved, the Counselor's Chinese chauffeur was taken into custody. The American Legation was instructed to call the attention of the Chinese Government to the generally recognized principles of international law as embodied in sections 4063-4065 of the Revised Statutes and to say that, under similar circumstances, in case of the arrest of the American chauffeur of a foreign diplomatic official in the United States, the Department of State would be disposed to arrange for the chauffeur's immediate release. The Legation was authorized to request reciprocal treatment. Prior to the receipt of the Department's instruction, the chauffeur was released on bond. Thereafter, on receiving the instruction, the Legation requested the chauffeur's unconditional release and the cancelation of the bond, which was granted.

Secretary Stimson to the Legation in Peiping, telegram 84, Mar. 6, 1931, MS. Department of State, file 124.933/399; the Counselor of the Legation in Peiping (Perkins) to Mr. Stimson, telegram 133, Mar. 14, 1931, *ibid.* /400.

Because of frequent instances of unwarranted interference by the Ethiopian police with the native servants of the various legations in Addis Ababa, the American Minister Resident inquired whether he should join his colleagues in formal representations on the subject if the local Diplomatic Corps should decide to address such representations to the Ethiopian Government. The Department replied:

The Department understands that the practice of granting immunity to employees or servants of diplomatic establishments, without regard to their citizenship, while engaged in the business of those establishments is almost universal. Moreover, the Department considers that such a practice is justified on the ground of practical necessity and convenience. Information as to the practice of the United States and of Great Britain in this connection is to be found in the penultimate paragraph of Section 664 and the whole of Section 665 of Moore's Digest of International Law, beginning at page 652 of Volume IV.

The Department is accordingly of the opinion that a continuance of the conditions described in your despatch under reference, despite the efforts made by informal diplomatic effort to secure their correction, would warrant a formal protest to the Ethiopian Government on the basis of the practical necessity and substantial universality of the custom of according immunity to servants of diplomatic establishments, regardless of their nationality, while they are engaged in the business of such establishments. Accordingly, you are authorized to join

with your colleagues in such a protest should the local Diplomatic Corps decide upon that course.

Under Secretary Castle to Minister Southard, no. 289, Oct. 27, 1932, MS. Department of State, file 701.0084/7.

In his opinion in the case of *Engelke v. Musmann*, Lord Phillimore said:

"When we come to the ordinary domestic servant, it may well be, that if he be a British subject, the Foreign Office may intimate that they cannot accept him so as to give him privilege. But according to English law (which may in respect of the domestic servant who is a national go somewhat beyond general international law) once the man is tendered as a domestic or as a domestic servant, and the tender is accepted, the status is created and the privilege attaches." [1928] A.C. 433, 451.

Immunity of
national of
a third
state

In May 1923 the automobile of the military attaché of the American Embassy in Vienna was involved in a collision. The car was being driven by the attaché's chauffeur, Kainz, who was a Czechoslovak national and whose status as an employee of the American Legation was communicated to the Austrian Foreign Office. Kainz was subsequently summoned to appear to give testimony in criminal proceedings against him in a Viennese court. The American Legation transmitted the summons to the Foreign Office and requested that the attention of the court be called to Kainz's status and to the rules of international law regarding the giving of testimony in courts of local jurisdiction by public ministers, their staff and servants. The Legation asked that the request for testimony "be submitted in the accepted fashion". The Foreign Office cited paragraph 61 of the Austrian Code of Penal Procedure providing exemption from local jurisdiction for the domestic and service personnel of accredited foreign ministers "who are at the same time subjects of the State to which the Minister belongs". It declared that there was no generally recognized principle of international law exempting from jurisdiction the servants of a foreign mission not possessing the nationality of the sending state and that the practice of states in this respect varied. On October 13 the Foreign Office wrote to the Legation that steps had been taken to prevent a forcible presentation of Kainz before the court and requested that measures be taken that he "be not withdrawn from responsibility before the competent tribunal".

The Department of State instructed the Legation that the exemption of diplomatic representatives from judicial citation by international usage applied also to registered personnel. It pointed out that the War Department offered no objection to Kainz's testifying, and the Legation was authorized to consent on behalf of the Government of the United States if the Austrian Foreign Office requested that immunity in this case be waived. The Department later in-

structed the Legation that by international usage immunity covered employees who were nationals of third states and that, if Kainz was a permanent employee in the office of the military attaché, it considered that by weight of authority the Government of the United States could claim immunity. The Legation was authorized to point out that when the Austro-Hungarian Ambassador's chauffeur was arrested in Maryland in 1907 on a charge of violating the automobile regulations of that State the Department had held that, irrespective of his nationality or the fact that he was not registered, he was entitled to immunity. It said that institution of criminal proceedings against Kainz and not against the driver of the other car seemed to be unwarranted and to indicate a bias against the former; and it authorized the Legation to take the matter up with the Foreign Office and to waive immunity in the case of Kainz, first, if criminal proceedings were also instituted against the driver of the other car and, secondly, if there were a change of venue in the event that Kainz's attorney considered that the change was warranted by reason of local prejudice. The Department said that if immunity was waived the Legation might consent to the giving of testimony by the military attaché and members of his family.

In March 1924 a summons was transmitted to the Legation by the Foreign Office for delivery to Kainz in a civil suit instituted against him and the United States of America by the owner of the other car. A lower court rejected the complaint against the United States on the ground that foreign states might not be proceeded against in Austrian courts, but it upheld its jurisdiction in respect to Kainz. The Department of Justice of the Federal Chancery expressed the opinion that Kainz was immune from Austrian jurisdiction in civil cases since he did not submit voluntarily. According to the Foreign Office, this opinion was binding on the lower court in question under the Austrian Code of Civil Procedure. The Legation returned the summons and withheld its consent to Kainz's submitting himself to Austrian jurisdiction. In June the Legation received a *note verbale* from the Foreign Office saying that an upper court had set aside the decree of the lower court as to the United States in the civil suit on the ground that under certain conditions Austrian courts were competent in suits against foreign states, especially when such states submitted themselves to local jurisdiction. The Foreign Office inquired whether the Government of the United States was willing to submit to Austrian jurisdiction, to which the Legation replied in the negative.

On August 19 the Legation reported that Kainz had been discharged from the employ of the military attaché in July; that the

decision of the Austrian court just referred to did not appear to reopen the question of civil suit against him; and that that question seemed to have been settled by the opinion of the Department of Justice referred to above.

Mr. Schoenfeld, of the American Legation at Vienna, to Secretary Hughes, no. 329, Oct. 12, 1923, MS. Department of State, file 121.54 Austria/5; Mr. Hughes to the Legation in Vienna, telegram 19, Oct. 16, 1923, *ibid.* /4; Mr. Schoenfeld to Mr. Hughes, no. 330, Oct. 15, 1923, *ibid.* /7; Mr. Hughes to the American Legation in Vienna, telegram 28, Dec. 29, 1923, *ibid.* /8; Minister Washburn to Mr. Hughes, no. 440, Mar. 24, 1924, *ibid.* /10; the Chargé d'Affaires ad interim (Andrews) to Mr. Hughes, no. 482, June 11, 1924, *ibid.* /14; the Assistant Secretary of State (Wright) to Mr. Andrews, no. 657, July 22, 1924, *ibid.* /10; Mr. Andrews to Mr. Hughes, no. 529, Aug. 19, 1924, *ibid.* /16.

**Termination
of employ-
ment**

An American citizen was charged in the Police Court of the District of Columbia with violation of parking restrictions while he was employed by the Japanese Ambassador. He was brought to trial after the termination of this employment, and in a memorandum opinion Judge Casey of the Police Court of the District of Columbia held that the defendant was not immune from arrest for the offenses alleged to have been committed while he was so employed. The judge said:

The privileges and immunities which this defendant enjoyed terminated with his employment at the Embassy. He, being a citizen of the United States and engaged in business in the District of Columbia, retained no privileges or immunities. Members of a mission and their families are accorded privileges and immunities after the termination of the functions of the members until such persons have had a reasonable opportunity to leave the territory of the receiving state. (See "Research on International Law," pp. 133, 134.)

Memorandum opinion (May 5, 1939), *District of Columbia v. Vinard L. Paris*, Cases Nos. 448485 to 448494, in the Police Court of the District of Columbia, MS. Department of State, file 701.9411/1194.

The President of the Board of Commissioners of the District of Columbia in 1922 requested the Department of State to ask the Japanese Ambassador to consent to the arrest of a chauffeur employed by him in order that he might be prosecuted for violating the laws against gambling. It appeared that the chauffeur had made bets with a detective in a garage, the property of the Japanese Embassy. The Department stated that, since the alleged violation of the law took place on the premises of the Japanese Embassy and since it appeared that the detective went there for the purpose of inducing the chauffeur to make bets, it did not consider that it could appropri-

ately ask the Japanese Ambassador to consent to his arrest or to discharge him from the service of the Embassy.

The Under Secretary of State (Phillips) to Cunoff Rudolph, Dec. 11, 1922, MS. Department of State, file 701.9411/363.

CIVIL PROCESS

§402

In 1915 a power company in Connecticut procured the attachment of the goods of the military attaché of the Russian Embassy in that State and caused him to be served with a summons to appear before a justice of the peace. The Department of State informed the Governor of Connecticut that, as the person in question was recognized by it as military attaché, it considered that he was entitled to the diplomatic immunities prescribed by international law and practice for members of foreign embassies and legations, among which was freedom from process or writ in civil suit. It requested the Governor to take steps to insure the return of the attached property and to quash the summons. It also suggested that an apology be tendered the attaché. At the same time the Department expressed its regret to the Russian Ambassador for the incident and subsequently informed him that the Governor had agreed to take steps toward releasing the attachment and to write a letter of apology to the attaché.

Secretary Lansing to the Governor of Connecticut, telegram of Oct. 7, 1915, and Mr. Lansing to Ambassador Bakhmeteff, telegrams of Oct. 7 and 12, 1915, MS. Department of State, file 701.6111/133.

On January 15, 1916 the British Ambassador informed the Secretary of State that he had received a summons from the United States District Court of Maine commanding him to appear in a civil suit instituted against him. The Secretary expressed his regret and requested the Department of Justice to make prompt investigation of the matter. Later he informed the Ambassador that on motion by the District Attorney an order had been entered by the court dismissing the writ.

Secretary Lansing to Ambassador Spring Rice, nos. 1050 and 1100, Jan. 28 and Mar. 9, 1916, MS. Department of State, file 701.4111/164, /172.

In the case of *Crédit foncier d'Algérie et de Tunisie c. Restrepo et département d'Antioquia*, the Civil Tribunal of the Seine (1st Chamber) in 1922 held that the Colombian Chargé d'Affaires was not immune from suit when he was sued neither in his own name nor as the representative of Colombia but as the mandatory of a department of Colombia, which "as it is not a sovereign State can legally be sued in the French courts". *Gazette du Palais*, 1923, I, 439; 50 *Journal du droit international* (1923) 857; *Annual Digest*, 1919-22, Case No. 201. The judgment was affirmed in 1924

by the Court of Appeal of Paris (3d Chamber). 22 *Revue de droit international privé* (1927) 81.

In 1932 the Supreme Court of Chile upheld the immunity of the French commercial attaché in Chile, whom a trial court had ordered to surrender to its new owner property which he had rented. The court stated that, although there was no express Chilean legislation granting immunity from civil jurisdiction, such immunity must be recognized as imposed by international law. 30 *Revista de derecho, jurisprudencia y ciencias sociales*, pt. II, sec. 1, p. 70; *Annual Digest*, 1931-32, Case No. 181.

See the case decided by the German Reichsfinanzhof in 1927 holding that the tax authorities could not threaten to penalize or penalize an attorney for a diplomatic envoy in Berlin for failure to make a declaration as to the taxes for which his principal was liable, since this amounted indirectly to constraining the envoy. I(2) *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1929) 202; *Annual Digest*, 1927-28, Case No. 248.

The United States Marshal for the District of Columbia transmitted to the Department of State a certified copy of a notice to Nancy Hoyt Curtis as defendant in a civil suit and to the Costa Rican Minister in Washington as garnishee, to appear in the District Court of the United States for the District of Columbia. An attachment of property in possession of the Minister was contemplated under the notice. The Legal Adviser of the Department of State informed the marshal that sections 252 to 254 of title 22 of the United States Code had been construed to include writs or processes in either criminal or civil actions requiring the appearance in court of ambassadors or ministers and that it was not considered that the notice in question could properly be served on the Minister.

The Legal Adviser of the Department of State (Hackworth) to John B. Colpoys, Apr. 24, 1939, MS. Department of State, file 701.1811/223.

In 1909 the editor and publisher of a magazine complained to the Department of State that, because of the publication therein of articles on Guatemala, the entire news-stand edition had been bought up by agents employed by the Guatemalan Minister and the Consul General in New York, and that its circulation had been greatly reduced and its advertising section (its sole source of profit) rendered valueless, thereby causing irreparable injury. The letter stated:

On these grounds we applied to Judge Lacombe of the U. S. Circuit Court in . . . [New York city] for an injunction to restrain said officers and agents of the Guatemalan government in this country from working us this injury.

The defendants' formal answer presented in court did not consist of any denial of the facts as alleged, but consisted of a simple affidavit to the effect that Ramon Bengoechea is a regularly accredited agent of the Guatemalan legation in Washington and is therefore legally unaccountable for actions performed in his capacity as a foreign diplomat. Judge Lacombe upheld the jus-

tice of this contention and denied the application for an injunction.

The letter concluded by denying the right of foreign diplomats to injure the legitimate business of citizens of the country to which they are accredited and asking to be informed as to "what form of redress can be obtained for us through the State Department". The Department replied that "it is not seen that any action on the part of this Government is advisable".

W. D. Walker to Secretary Knox, July 13, 1909, and Acting Secretary Wilson to W. D. Walker, July 29, 1909, MS. Department of State, file 20588.

It was brought to the attention of the Department of State in 1920 that a verdict had been obtained in a New York court against the Second Secretary of the Peruvian Embassy in Washington. The Department called the Governor's attention to sections 4063 and 4064 of the Revised Statutes of the United States and stated that the words "public minister of any foreign prince or state, authorized and received as such by the President" were applicable to a secretary or second secretary of an Embassy who had been duly recognized as such by the Secretary of State. The Governor was requested to bring the matter to the attention of the proper legal authorities of the State of New York in order that the Secretary might be relieved from any process under the judgment which presumably had been entered against him. Secretaries

With reference to the exemption from sections 4063 and 4064 of the Revised Statutes provided for in section 4065 in respect to "a citizen or inhabitant of the United States, in the service of a public minister", the Department pointed out that the Second Secretary could not properly be classified as "an inhabitant of the United States" within the meaning of the statute since, when the cause of action arose on which he was sued, he was serving as Consul of Peru at New York, from which position he was promoted to the position of Second Secretary. It was also stated that he could not be regarded as a person "in the service of a foreign minister" since those words appeared to relate to domestic service.

Secretary Colby to the Governor of New York, Apr. 24, 1920, MS. Department of State, file 701.2311/142a.

In 1940 an action was brought in the Supreme Court of the State of New York against Armando Vidal and Decio de Moura (representing Brazil at the New York World's Fair in 1939), Paul Lester Wiener, and the Government of the United States of Brazil. Decio de Moura was First Secretary of the Brazilian Embassy in Wash-

ington and also General Secretary of the Brazilian Delegation at the World's Fair in New York. The Department of State informed the Attorney General on March 28 that, in view of the provisions of title 22, sections 252-253, of the United States Code, it considered that the proceedings should be dismissed so far as Decio de Moura was concerned because of his status as First Secretary. Attorneys for Decio de Moura and the Brazilian Government moved to dismiss the complaint against these defendants, and on May 7, 1940 the motion was granted on the ground that a sovereign cannot be sued in the courts of the United States and "service cannot be made on a duly accredited diplomatic representative".

The Counselor of the Department of State (Moore) to the Attorney General (Jackson), Mar. 28 and Apr. 11, 1940, MS. Department of State, file 811.607 New York 1939/2497, /2518; *Copeland Exhibits, Inc. v. Vidal*, 103 N.Y.L.J. (N.Y. Sup. Ct., May 7, 1940) 2080.

Member
of boundary
commission

In 1938 there was pending in the Municipal Court of the District of Columbia a suit against Dr. Enrique Arroyo-Delgado, Secretary General of the Ecuadoran Boundary Commission, which had met in Washington with the Peruvian Boundary Commission to settle the boundary dispute between Ecuador and Peru. The Department of State, on December 1, 1938, informed the presiding judge of the Municipal Court of the District of Columbia that Dr. Arroyo had been received by the Government of the United States in a diplomatic capacity and had been accorded the immunities accorded to members of diplomatic missions and that, since the two Boundary Commissions had been meeting in the United States under the auspices of the Government of this country, it was of the opinion that he was entitled to diplomatic immunity.

Acting Secretary Welles to Judge Aukam, Dec. 1, 1938, MS. Department of State, file 722.2315/1274.

After
resigna-
tion

Shortly after the resignation of Arthur Hugh Frazier as American Chargé d' Affaires *pro tempore* in Austria, Count Salm, the proprietor of a house rented by Frazier as the Legation building, brought suit against him in connection with the lease and, in his absence from Austria, obtained a judgment. Count Salm subsequently sought to have the judgment executed in the courts of France. The suit was dismissed by the Court of First Instance at Les Andelys, Eure, and the decision was affirmed by the Court of Appeal of Rouen, First Civil Tribunal, July 12, 1933, *inter alia* on the following grounds:

Considering that it appears from the documents in the case that Frazier was accredited by the United States of America

as commissioner for Austria on September 13, 1920; later being accredited as chargé d'affaires to the same state, from November 25, 1921, until July 22, 1922, when his resignation became effective;

Considering that it appears further that the proceedings which were brought against him by Salm before the Austrian courts and that the judicial decisions for which the latter solicits recognition (execution?) were in the nature of indemnities claimed from Frazier by Salm as the result of the leasing of real estate and consequential chattels, rented in November 1920 by this diplomat for the housing of himself, his family and his servant personnel DURING THE COURSE of his mission;

Considering that, as a result, these decisions relate to acts entered into by Frazier while a diplomatic agent and connected with the practice of his functions;

Considering that, if immunity attaches more to the functions than to the person of the diplomatic agent and does not outlast beyond the discontinuance of his functions, nevertheless that (interpretation) applies only to acts taking place after the discontinuance of said functions;

That it could not be admitted to the contrary that he could be called to account like a private individual for actions contemporaneous with his mission and connected with it; that it would be, as have stated the first judges, rendering illusory the very principle of immunity.

For copies of the court decisions, see enclosures to despatch 27 from the Consul at Le Havre, France, Jan. 8, 1934, MS. Department of State, file 123F861/158; and 28 A.J.I.L. (1934) 382-383 (translation of decision of the Court of Appeal).

In 1923 a civil suit arising out of an automobile accident was brought against F. L. Belin and his chauffeur in Paris. At the time of the accident Belin was Secretary of the American Embassy in that city, but his official functions as Secretary ceased prior to the commencement of the suit, though he continued in the Foreign Service of the United States. The Court of Appeal of Paris in 1925 rejected his plea of diplomatic immunity on the ground that such immunity does not extend beyond the time of the diplomat's mission.

53 *Journal du droit international* (1926) 64; *Annual Digest*, 1925-26, Case No. 241.

See the case of *In re García y García*, 28 *Gaceta de los tribunales* 577 (Supreme Court of Guatemala, 1932), and *Annual Digest*, 1931-32, Case No. 180 (no immunity for minister of a foreign country after termination of mission in prosecution for an attempt to defraud the customs during mission).

In the case of *Procureur Général c. Nazare Aga*, the Court of Cassation (Civil Chamber) in 1921 upheld the immunity of the Counselor of the Persian Legation in Paris in a suit brought on a promissory note signed allegedly before he assumed his diplomatic functions. *Dalloz, Recueil*

périodique et critique (1925), pt. I, p. 87; 48 *Journal du droit international* (1921) 922; *Annual Digest*, 1919-22, Case No. 203.

A civil suit was brought in Vienna against the former German Minister to Austria in or about 1934. The Minister contended before the court that he was not subject to Austrian jurisdiction. The court applied to the Federal Ministry of Justice, which, in conjunction with the Federal Chancellor, Department for Foreign Affairs, stated that the Minister still enjoyed the privilege of extritoriality in Austria. In a *note verbale* of May 8, 1935 this department informed the American Legation that this statement was based on a rule of comity in international law, according to which persons enjoying extritoriality, even after formal conclusion of their mission, were still granted the same privileges for themselves and family and property for a certain length of time until their actual departure from Austria and that this period was usually taken in Austria to be one year. It was also stated that the Minister in question, who had not removed all his household furniture from Vienna, had not yet actually left Austria definitively. The American Chargé d'Affaires ad interim in Austria (Klieforth) to the Secretary of State (Hull), no. 422, May 16, 1935, MS. Department of State, file 701.6263/34.

Suit against
wife after
separation
agreement

The Department of State, on May 21, 1934, informed the Spanish Ambassador that certain persons contemplated taking legal action against the wife of the naval attaché of the Spanish Embassy and that, in reply to inquiries from the marshal of the District of Columbia as to whether she was entitled to diplomatic immunity, it had pointed out that her name no longer appeared in the Diplomatic List, a condition which seemed to be necessary to clothe one with diplomatic immunity under the provisions of the United States Code. An agreement of separation between the attaché and his wife had been signed one month previously. The Department said that the marshal hesitated to take action in view of the peculiar situation, since it might be contended that the person in question was still, as a matter of fact, the wife of a foreign diplomatic officer and on those grounds alone might be entitled to diplomatic immunity. The Department inquired whether the Ambassador considered her to be entitled to diplomatic immunity and expressed the opinion that she was not so entitled. The Chargé d'Affaires ad interim of Spain replied that the Spanish Embassy did not find itself obliged to grant her a moral protection greater than that which, apparently, her husband desired to give her and that therefore he did not consider her as entitled to immunity against legal proceedings.

The Special Assistant to the Secretary of State (Dunn) to the Spanish Ambassador (De Cárdenas), May 21, 1934, MS. Department of State, file 701.5211/440; the Spanish Chargé d'Affaires (Yrujo) to Mr. Dunn, May 23, 1934, *ibid.* /444.

The American Ambassador to Spain was threatened with a libel suit in Great Britain. The Department of State instructed the

Embassy in London informally to ask the opinion of the British Foreign Office as to whether the Ambassador would be immune from process issuing from a British court if in England in transit to his post or if in England on business or pleasure while not in transit. The Foreign Office stated that it was clear that, if an attempt were made to sue the Ambassador while in Great Britain, the courts would find no reported case decisive on the point and would have to decide it according to their view of international law and that, in view of the difference of opinion among textbook writers, it was impossible to predict the result. It seemed to be generally agreed, the Foreign Office continued, that there would be no immunity if the Ambassador were in Great Britain on pleasure.

In third
countries

Ambassador Dawes to Secretary Stimson, telegram 301, Nov. 24, 1930, MS. Department of State, file 811.014/195.

An attaché of the Legation of the Republic of Panama in Italy moved to vacate an order of arrest and a service of summons in an action for absolute divorce in New York. The Supreme Court of New York (special term, New York County) granted the motion to vacate the order of arrest and to discharge the bond but denied the motion to vacate the service of summons. The court pointed out that the attaché could take no advantage of provisions of the Federal Judicial Code, which apply only to persons of diplomatic status accredited to the Government of the United States. Citing the case of *Holbrook v. Henderson*, 6 N.Y. Super. Ct. 619 (1851), the court said:

In *Wilson v. Blanco*, 4 N.Y. Supp. 714, the General Term of the City Court erroneously states that the court in *Holbrook v. Henderson* "expressed the opinion that the privilege of an ambassador extended to immunity against all civil suits sought to be instituted against him in the courts of the country to which he was accredited, as well as in those in a friendly country through which he was passing on his way to the scene of his diplomatic labors." There is a clear distinction between immunity from the service of civil process and immunity from arrest or other interference with personal freedom. The principle of international law which grants an ambassador immunity from suit in the country to which he is accredited rests upon the reason that the ambassador is not to be interfered with or coerced by any of the powers inherent in the sovereignty to which he is accredited. A country through which he is merely passing to or from the country to which he is accredited owes him only the duty not to prevent him from discharging his diplomatic function by restraint on his personal liberty. As stated by Oppenheim (1 Internat. Law [3d ed.] 574): ". . . there ought to be no doubt that such third State must grant the right of innocent

passage to the envoy . . . But other privileges . . . need not be granted to the envoy."

Estelle Carbone v. Carlos Carbone, Jr., 123 Misc. 656, 657, 206 N.Y. Supp. 40, 41-42 (1924).

Claim of
immunity
for employees

An employee of the American Legation in Ottawa in 1934 received a special summons from a local magistrate to appear and answer a claim against him. The Department instructed the Legation that if Canada had a provision similar to section 254 of title 22 of the United States Code it was assumed that the employee's name had been furnished the Department of External Affairs. It said also that, assuming that the debt arose subsequent to his employment in the Legation, the Legation should claim immunity for the employee through the Department of External Affairs and endeavor to have the suit dismissed. The Department of External Affairs stated that the proper procedure was for the Legation to supply the employee's lawyer with a statement of his official status to be used in applying to the magistrate to set aside the writ.

Chargé Boal to Secretary Hull, no. 817, Sept. 24, 1934, and Mr. Hull to the American Legation in Ottawa, telegram 103, Sept. 27, 1934, MS. Department of State, file 124.423/100; Minister Robbins to Mr. Hull, telegram 99, Sept. 28, 1934, and the Department of State to Mr. Robbins, no. 506, Sept. 29, 1934, *ibid.* /102.

In the case of *Assurantie Compagnie Excelsior v. Smith* the British Court of Appeal held, in an action for calls on shares, that the chief of the mail department of the American Embassy at London, who was an American citizen and whose name appeared in the list of the Embassy staff periodically submitted to the British Foreign Office, was immune from judicial process.

40 T.L.R. 105 (1923).

Suit was brought against an American citizen, Lorenzo Chance, in 1918 before the County Bench at Kingston-on-Thames charging obstruction and assault. Chance pleaded immunity as an official of the American Embassy in London. A letter from the British Foreign Office was submitted in evidence stating that as the name of the defendant had not been returned to it by the American Ambassador as that of a member of the Ambassador's staff he did not appear in the list of persons who were entitled to claim immunity from legal proceedings in Great Britain on the ground of diplomatic privilege. The defendant was sentenced to pay a penalty including costs. XVIII Journal of Comp. Leg. and Int. Law (new ser., 1918) 279.

In 1937 a suit growing out of a traffic accident was instituted in Cuba against a part-time employee of the American Embassy, a "Legal Translator", who was a Cuban citizen. The Department of

State did not consider that it would be justified in claiming diplomatic immunity for him.

Assistant Secretary Carr to Chargé Matthews, no. 1204, Mar. 19, 1937, MS. Department of State, file 124.373/238.

In response to an inquiry as to whether an American diplomatic representative or his agent or servant would be immune to service of process in civil actions in the United States, the Department of State replied that there was no statute granting immunity to an American Minister while in this country.

American
diplomatic
officers in
the U.S.

The Assistant Secretary of State (Carr) to R. E. Booker, Mar. 8, 1937, MS. Department of State, file 123Su6/320.

Certain attorneys in the city of New York wrote to the Department of State in 1925 with regard to the possibility of obtaining service of process on the Second Secretary of the American Embassy in Mexico City, who was stated to be a former officer and director of a corporation and a defendant in an equity action brought by the receivers of that corporation. The Department stated that it had no rule or regulation which would aid them in obtaining jurisdiction over the Secretary and that it could make no suggestions to assist them except that possibly service could be obtained by publication under order of court.

Service on
American
officer
abroad in
suit pending
in the U.S.

The Assistant Secretary of State (Wright) to Messrs. Bonyng and Barker, July 25, 1925, MS. Department of State, file 123N47/41.

The Secretary of State, in 1937, wrote to an inquirer that he had had a thorough investigation made into the question of whether an attachment could be filed against the salary of an American Ambassador and that he had found that, under decisions of the courts and rulings of the Comptroller General of the United States, salary due an American diplomatic officer could not be subjected to attachment.

Secretary Hull to W. C. Underwood, Oct. 18, 1937, MS. Department of State, file 123 B., R. W./167.

A summons was served in New York State on the commercial attaché of the Royal Italian Embassy in 1931. The defendant produced two certificates of the Department of State to the effect that he was in fact commercial attaché to the Italian Embassy. The request of the Department of State—that the New York court should take into consideration its opinion that the defendant was immune from service of process—having been transmitted to that court by the United States attorney, the court communicated with the Department through the Attorney General, requesting that the status

Definition
of status

of the defendant be defined. The Department thereupon wrote to the Attorney General explaining the functions of a commercial attaché and stating that in its opinion the proceedings should be dismissed. The Supreme Court of New York (Appellate Div., 1st Dept.) granted a motion to dismiss the action.

Girardon v. Angelone, 234 App. Div. 351, 254 N.Y. Supp. 657 (1932); the Assistant Secretary of State (Carr) to the Attorney General, Nov. 7, 1931, MS. Department of State, file 701.6511/702.

The case of *Fenton Textile Association, Limited v. Krassin and Others* involved an action for the price of goods sold and delivered to the defendant, who was the official agent of the Soviet Government in Great Britain, appointed under and for the purposes of a trade agreement of March 16, 1921 between Great Britain and the Russian Socialist Federal Soviet Republic. The agreement provided that the official agents appointed thereunder should be immune from arrest and search. The Court of Appeal held that the defendant was not entitled to immunity from process as the authorized representative of a foreign state. Lord Justice Bankes pointed out that the agreement did not provide for immunity from civil process and that it created a very exceptional position for the persons to be appointed thereunder. Lord Justice Scrutton expressed the view that the defendant's position was determined not by any general law of nations or common law but by the special agreement. He said:

. . . In view of the Foreign Office letters he does not appear to be an ambassador or public Minister authorized and received by the Sovereign, and as a special diplomatic representative for a temporary purpose he is here on the terms of a special agreement which does not confer on him the immunity he seeks.

38 T.L.R. 259, 262 (1921).

By a temporary commercial agreement of Feb. 16, 1934 between Great Britain and the Union of Soviet Socialist Republics, the British Government agreed to the establishment in London of a trade delegation "consisting of the Trade Representative of the Union of Soviet Socialist Republics and his two deputies, to form part of the Embassy of the Union of Soviet Socialist Republics". It was agreed that the head of the delegation and his two deputies should be "accorded all diplomatic privileges and immunities" and that immunity should "attach to the office occupied by the Trade Delegation . . . and used exclusively for the purpose" defined in the agreement. Gt. Br., Treaty Series no. 11 (1934), Cmd. 4567.

For other cases regarding actions against members of Soviet commercial missions, see: *In re Serventi* (Tribunal of Rome, 1921), *Monitore dei tribunali* (1922) 31, and *Annual Digest*, 1919-22, Case No. 211; case of the status of the Russian Trade Delegation (German Reichsarbeitsgericht, 1930) (interpreting a Russo-German treaty of 1925 and an economic agreement forming part thereof), *V Zeitschrift für Ostrecht* (1931) 196, and *Annual Digest*, 1929-30, Case No. 203.

The American Minister to Haiti was served in 1906 with notice to withhold payment of the rent due on the Legation premises until a pending suit should determine to whom the rent belonged. The Department of State instructed him that—

while a diplomatic officer is not amenable to the civil or criminal jurisdiction of the country to which he is accredited, and while an American diplomat so circumstanced may neither appear in court nor accept or acknowledge judicial service, you might through the Foreign Office cause the court to be advised that you will gladly withhold payment of the rent of the premises in question until the party may be ascertained in the judicial proceeding to whom payment of the rent due be made, or if preferred that you will pay the said rent into court for such distribution as the court may eventually order. Court orders

Acting Secretary Adee to Minister Furniss, no. 39, Aug. 18, 1906, MS. Department of State, file 346.

The Peruvian Foreign Office transmitted to the American Embassy in Lima a court order garnishing the payments due the landlord as rent on the house occupied by the Third Secretary of the Embassy and requested the Ambassador, if he saw no objection, to ask the Secretary to comply with the order. The Department of State authorized the Secretary to do this and stated that diplomatic immunity should not be used in such a way as to defeat the ends of justice. It pointed out further that the order was not served on the Secretary but was transmitted through the Foreign Office. The Department said that if the landlord should attempt to sue the Secretary he could, of course, plead his diplomatic immunity or, if he should waive it, the order of the court would be a sufficient defense. The Assistant Secretary of State (White) to Ambassador Dearing, no. 423, Dec. 12, 1932, MS. Department of State, file 123 Ackerson, Garrett G./124.

The Peruvian Foreign Office in 1933 forwarded to the American Embassy in Lima a court order requesting that the Embassy pay into court the rent owed to the landlord of the property which it was occupying until a debt of the landlord to a third party was satisfied. The Department of State instructed the Embassy that it might comply with the court's order. The Third Secretary of Embassy in Peru (Ackerson) to the Secretary of State (Stimson), no. 2479, Jan. 1, 1933, and Secretary Stimson to the American Embassy in Lima, telegram 10, Jan. 14, 1933, MS. Department of State, file 124.231/203.

A court in Mexico City in 1933 issued an order directing the Third Secretary of the American Embassy in that city to pay rent for the house he was occupying to a person appointed by the court rather than to his lessor. The Department of State instructed the Ambassador that the Third Secretary "might well voluntarily comply with the order of the court". Counselor Moore to Ambassador Daniels, no. 2247, Oct. 15, 1933, MS. Department of State, file 123 Fox, Hugh C./134.

The immunity from the jurisdiction of the country to which a diplomatic representative is accredited, which is accorded under the law of nations to said diplomatic representative, his official staff and household, and the exemption of premises occupied in Waiver

an official diplomatic capacity, shall not be waived except by consent of the Secretary of State.

For. Ser. Reg. U. S. III-1, Jan. 1941; Ex. Or. 8181, June 22, 1939.

For a collection of authorities on renunciation of privileges and immunities, see the comment in the Harvard draft convention on "Diplomatic Privileges and Immunities", 26 A.J.I.L. Supp. (1932) 125.

Immunity of an American diplomatic officer from local jurisdiction attaches to his office and cannot be waived except with the consent of his government; neither the legation nor a member of a staff is authorized to waive the immunity.

The Acting Secretary of State (Grew) to the American Legation in Vienna, telegram 85, Aug. 12, 1925, MS. Department of State, file 124.63/41.

Waiver
by wife

The Supreme Court of New York declared that, while it was true that a defendant, the wife of a Secretary of Legation, could not be proceeded against by execution *in personam*, she had nevertheless by her voluntary appearance and defense on the merits invited a judicial determination of the controversy; accordingly it granted a motion to strike out her separate defense. It said:

... There is no doubt that an envoy may not waive his diplomatic immunity without consent of the sending state. Whether this inability to waive also applies to his wife, family, and domestic servants is a matter of conflict among text-writers. The better view seems to be that waiver on the part of such persons does not require the consent of the home state and is therefore effective.

Herman et al. v. Apetz et al., 130 Misc. 618, 619, 224 N.Y. Supp. 389, 390 (N.Y. Cy., spec. term, 1927).

A civil suit was brought in the Supreme Court of New York County against an attaché of the Polish Embassy in Washington in 1939. The Polish Ambassador informed the Secretary of State that the diplomatic immunity enjoyed by the attaché was waived for the purposes of the action. Subsequently a motion was made by the defendant contesting the service of process on him and raising the question whether the waiver of immunity was effective since it was not given by the Polish Government itself. The court granted the motion to the extent of designating an official referee to take proof in the question, since it was not clear whether the waiver of immunity was made by the Polish Government through its Ambassador or by the Embassy itself. The decision was transmitted to the Department of State by the attorney for the plaintiff, who requested the Department to ascertain the nature of the waiver of immunity. The question was referred to the Ambassador who replied that the waiver was granted for and on behalf of the attaché's Government. A certified

copy of this reply was communicated to the attorney for the plaintiff by the Department with the comment that although it had made the inquiry it did not consider that there was any reason, in the first instance, for questioning the action of an accredited foreign ambassador to the United States in waiving the immunity from court process of a member of his staff.

L. M. Greene, Esq., to Secretary Hull, May 17, 1939, and the Legal Adviser of the Department of State (Hackworth) to Mr. Greene, June 1, 1939, MS. Department of State, file 701.60C11/360; *Von Kupsa v. Budny*, 101 N.Y.L.J. (N. Y. Sup. Ct., May 17, 1939) 2271.

The Guatemalan Consul General in New York, who was also Secretary of the Guatemalan Legation in Washington, caused the arrest in 1907 of the editor of a newspaper for the publication of an alleged libel upon the President of Guatemala in violation of the New York Penal Code. Counsel for the editor, desiring to bring suit against the Consul General for an alleged libel subsequently published by the latter against him, addressed certain inquiries to the Department of State, which replied:

Institution
of suit as
waiver

... you request the Department for information in regard to four points. First, you ask whether "R. Bengoechea, Consul-General of Guatemala at New York, is also listed as being employed as Secretary of the Legation at Washington?" As to this query the Department responds in the affirmative, Mr. Bengoechea holds the position of Secretary of Legation of Guatemala, a diplomatic post.

Secondly, you ask the Department whether Mr. Bengoechea is "entitled to the immunity from civil or criminal process accorded by the laws of the United States to diplomatic officers?" The affirmative answer already given to your first query will enable you to readily determine for yourself the rights and exemptions attaching to Mr. Bengoechea's position by reference to the pertinent provisions of the Revised Statutes, with which you are already familiar, Sections 4062-4066.

Third. In case either of your first two inquiries are answered in the affirmative, you ask whether Mr. Bengoechea "having invoked the criminal laws of the State for the punishment of a person claimed to have committed a libel, he has waived such diplomatic immunity so that he whom he personally accuses may also have recourse to the civil and criminal process of this State for the protection of his name and honor?" The Department is not advised of any express judicial decision as regards the question whether or not a diplomatic officer waives his statutory immunity under the circumstances which you suggest, and the question raised is not only in its nature difficult of decision, but is one peculiarly appropriate for judicial cognizance. It may be said, however, that in practice the precedents seem to indicate that facts analogous to those suggested by you have not been

considered to work a waiver of diplomatic privileges. Indeed, it has been questioned by high authority whether or not any diplomatic officer is capable of waiving such privileges without the consent of his Government.

The Acting Secretary of State (Adee) to Perry Allen, Aug. 28, 1907, MS. Department of State, file 8102/-4.

For cases in which the Department of State has authorized the waiver of immunity of members of American Embassies or Legations abroad in civil suits, see: The Secretary of State (Root) to the Chargé d'Affaires in Germany (Garrett), June 10, 1908, MS. Department of State, file 10892, and 1907 For. Rel., pt. I, p. 527 (waiver of porter's immunity in suit for personal insult and obstruction of public officer, service to be personal and outside of Embassy precincts); the Secretary of the Embassy in Italy (Hitt) to Mr. Root, Feb. 6, 1908, and the Assistant Secretary of State (Bacon) to the Embassy in Italy, telegram of Feb. 26, 1908, MS. Department of State, file 11924 (waiver of immunity of Secretary of Embassy in suit arising from automobile accident); the Acting Secretary of State (Phillips) to the Embassy at Brussels, telegram 33, June 5, 1883, *ibid.* 123 Browne, A.S./43 (waiver of clerk's immunity in divorce proceedings); the Secretary of State (Hull) to the Minister in Canada (Robbins), no. 611, Jan. 29, 1935, *ibid.* 123G832/246 (waiver of immunity of Secretary of Legation in suit involving an automobile accident).

In the case of *In re Republic of Bolivia Exploration Syndicate, Limited*, the liquidator of the company issued a summons against the directors thereof and the auditors. On the hearing of the summons before a British court one of the directors, Mr. Lembcke, took the preliminary objection that as a Second Secretary of the Peruvian Legation he was entitled to diplomatic privilege. The liquidator admitted that Mr. Lembcke was entitled to diplomatic privilege but contended that he had waived it by previously entering an unconditional appearance to the summons; asking for time to file evidence; and making an affidavit on the merits, stating his official position but not raising any objection to the jurisdiction. The Chancery Division of the High Court of Justice, speaking through Astbury, J., held that there had been no effective waiver established. Astbury, J., said:

. . . No doubt he entered an unconditional appearance, asked for further time to file evidence, and filed evidence on the merits stating his official position, but not raising any question of privilege. Has he thereby waived his privilege? It seems to me that on this question there are three matters to be considered. In the first place, having regard to the earlier cases as to the absolute nullity of proceedings against foreign public ministers I am satisfied that waiver, if it be possible, must be strictly proved. It implies a knowledge of the rights waived, and I am not satisfied that R. E. Lembcke when he entered appearance and took the subsequent steps was aware of his privilege. Secondly, knowledge of our common and statute law

cannot be imputed to a foreign subject residing here as diplomatic agent of a foreign State. Thirdly, I am far from satisfied that a subordinate secretary can effectually waive his privilege without the sanction of his Sovereign or Legation, and it is clear that, whatever knowledge R. E. Lembcke possessed, the objection on the ground of privilege is now taken with the sanction and at the instigation of the Peruvian Legation.

[1914] 1 Ch. 139, 156.

In the case of *Dickinson v. Del Solar* the plaintiff sought to recover damages for injuries to him by the defendant's automobile. Judgment was entered against the defendant, who claimed a declaration against his insurance company that he was entitled to be indemnified against any damages adjudged against him. The insurance company claimed the defendant was under no legal liability since he was First Secretary of the Peruvian Legation in London. It appeared that the Minister of the Peruvian Legation had forbidden the defendant to rely upon diplomatic immunity. The King's Bench Division, speaking through Lord Hewart, C.J., held that the insurance company was liable. Lord Hewart said:

"Diplomatic agents are not, in virtue of their privileges as such, immune from legal liability for any wrongful acts. The accurate statement is that they are not liable to be sued in the English Courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the Sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the Sovereign or of the official superior of the agent: *Taylor v. Best*¹ (14 C.B. 487); *In re Suarez*² (² [1918] 1 Ch. 176, 193). In the present case the privilege was waived and jurisdiction was submitted to by the entry of appearance: *In re Suarez* . . . *Duff Development Co. v. Government of Kelantan*³ (³ [1924] A.C. 797, 830), and as Mr. Del Solar had so submitted to the jurisdiction it was no longer open to him to set up privilege. If privilege had been pleaded as a defence, the defence could, in the circumstances, have been struck out. Mr. Del Solar was bound to obey the direction of his Minister in the matter . . . It has been argued that by reason of the privilege execution cannot issue against Mr. Del Solar on the judgment. That is perhaps an open question: *Duff Development Co. v. Government of Kelantan*. . . But in my opinion it is not necessary to decide it. Even if execution could not issue in this country while Mr. Del Solar remains a diplomatic agent, presumably it might issue if he ceased to be a privileged person, and the judgment might also be the foundation of proceedings against him in Peru at any time. I hold therefore that the third parties here are liable."

[1930] 1 K.B. 376, 380.

In the case of *Reichenbach et Cie. c. Mme. Ricoy*, the Civil Tribunal of the Seine (6th Chamber) in 1906 upheld the immunity from suit of the wife of the Second Secretary of the Mexican Legation in Paris and stated that this immunity could be pleaded at any time during the action, even after issue had been joined on the merits (*après conclusions au fond*), and that a renunciation would only have been valid if authorized by the Secretary's Government. France

34 *Journal du droit international privé* (1907) 111. To the same effect, see *Rondeau c. Castanhiera da Nevès* (Civil Tribunal of the Seine, 7th Chamber, 1907), *ibid.* 1090.

In 1907 the Court of Paris (8th Chamber) in the case of *In re Henriques de Zubiria* held that, although by appearing in court in response to a citation in conciliation proceedings in respect to a dispute with his wife as to alimony and the custody of children an attaché of the Colombian Legation in Paris had renounced his immunity from judicial process, such renunciation did not extend to an action for separation in which he did not appear and that the courts were therefore without jurisdiction in respect to the latter. 34 *Journal du droit international privé* (1907) 1088.

In the case of *Dessus c. Ricoy* the Civil Tribunal of the Seine (7th Chamber) in 1907 refused to take jurisdiction of an action against a member of the Mexican Legation in Paris although the defendant had renounced a previous plea of immunity. The court stated that the immunity of diplomatic agents was not personal but an attribute of the state they represented and that the defendant had shown no authorization from his government for his renunciation. 34 *Journal du droit international privé* (1907) 1086.

In the case of *Cottenet et Cie. c. Dame Raffalowich* the Court of Paris (1st Chamber) in 1908 held that the French courts had jurisdiction in an action against the wife of a member of the Russian Embassy in Paris, who could not plead diplomatic immunity, since the Russian Chargé d'Affaires had written to the French Ministry of Foreign Affairs that his Government waived her immunity. 36 *Journal du droit international privé* (1909) 150.

. In the case of *Demoiselle B. c. D.* the Civil Tribunal of the Seine (8th Chamber) in 1927 held a chancellor of a foreign legation in Paris immune from suit, saying that the voluntary submission of diplomatic agents to the territorial jurisdiction of the country to which they are accredited must be authorized by their government. 55 *Journal du droit international* (1928) 637; *Annual Digest*, 1927-28, Case No. 249.

In the case of *Drtilék c. Barbier* the Court of Appeal of Paris (7th Chamber) in 1925 held that, since the name of the plaintiff, the Chancellor of the Czechoslovak Legation in Paris, did not appear on the official list kept at the French Ministry of Foreign Affairs, the ordinary remedies were available against him in the French courts in a dispute as to rent. It stated also that, even had his name appeared on that list, he had waived his immunity from jurisdiction by invoking against his landlord the benefit of French legislation in regard to rents. 53 *Journal du droit international* (1926) 638; *Annual Digest*, 1925-26, Case No. 242.

In a case decided in 1925 the German Reichsgericht held that, as the plaintiff, a Secretary in the Chinese Embassy at Berlin who had obtained a provisional court order for delivery of a car, was wrongfully in possession of the car, he was liable to a cross-suit by the vendor for restitution of the car. 111 *Entscheidungen des Reichsgerichts in Zivilsachen* 149; *Annual Digest*, 1925-26, Case No. 243.

Italy

In 1920 proceedings were brought against an employee of the American Embassy in Rome to compel him to release an apartment

which he had rented from the plaintiff. The Department of State on January 6, 1921 instructed the Ambassador in Italy as follows:

You are instructed to bring the case of Mr. Kite to the attention of the Foreign Office, pointing out that he is a member of the registered personnel of the Embassy; that he is of American nationality, and that as such, he would be entitled to exemption from civil or criminal process. You may point out that in endeavoring to procure suitable residential quarters, Mr. Kite is not engaging in private business outside of his character as an employee of the Embassy, and that in doing so, he does not forfeit his immunity from the service of process.

You may add that according to the laws of the United States, a registered employee of the Italian Embassy in this country engaging in a similar capacity to that of Mr. Kite, would be entirely exempt from civil or criminal process in such matters, and that any officer of this Government who attempted to serve any process upon such a person would be liable to punishment.

You may state in conclusion that this Government does not believe that the Italian Government intends to deny to the registered personnel of the American Embassy at Rome immunity from civil and criminal jurisdiction, freely granted by this Government to the Italian diplomatic representatives in this country in accordance with the well established principles of international law, and request that the process served upon Mr. Kite by the sheriff be declared null and void and the proceedings against him discontinued.

At the same time you will instruct Mr. Kite that if Signora Comina is acting in accordance with the provisions of the Italian law in demanding the possession of her premises, he is not to seek to avoid the consequences of the law by recourse to his character as an employee of the Embassy.

The Second Assistant Secretary of State (Adee) to the Ambassador in Rome (Johnson), no. 147, Jan. 6, 1921, MS. Department of State, file 701/101. No reply was made by the Italian Government to the American Embassy's note written in conformance with this instruction. In a decision in this case of Jan. 31, 1922 the Court of Cassation of Rome held that a representative of a foreign government was subject to the civil jurisdiction of the Kingdom of Italy for all acts for which the competency of the Italian courts was admitted according to the common law (art. 105, Code of Civil Procedure) except where he had acted as a representative of a foreign state. 47 *Foro italiano* (1922), pt. 1, p. 344; *Annual Digest*, 1919-22, Case No. 202. On June 24, 1922, following a meeting of the Ambassadors in Rome, the French Ambassador, as Dean of the Diplomatic Corps, addressed a *note verbale* to the Italian Minister of Foreign Affairs expressing his reservations to the decision and stating that it was contrary to the rule in practice in all states. The Ambassador to Italy (Child) to the Secretary of State (Hughes), nos. 233 and 377, Mar. 13 and July 5, 1922, MS. Department of State, file 701/109, /110. For the text of the French Ambassador's *note verbale*, see 26 A.J.I.L. Supp. (1932) 105.

In the case of *In re Rinaldi* the Court of Cassation of Rome in 1915 stated that diplomatic agents were immune from suit only in respect to acts performed by them in the exercise of their functions and not in respect to acts having no connection with their missions, and that these privileges extended only to the persons actually representing sovereign powers and not to the persons assisting them, such as counselors, secretaries, and attachés, to whom they pertained only when they were exercising the functions of their chiefs.

40 *Foro italiano* (1915), pt. 1, p. 1330.

In 1928 the Tribunal of Rome, in the case of *Perrucchetti c. Puig y Casauranc*, held that it had jurisdiction in a suit against the Mexican Ambassador, arising out of a dispute as to a contract into which he had entered for the purchase of certain property to be used as the Mexican Embassy building. 20 *Rivista di diritto internazionale* (1928) 521; *Annual Digest*, 1927-28, Case No. 247.

In the case of *Oimino Bosco c. Quijano Escheverri e Quijano Vallis Oardenas* the Tribunal of Rome held in 1930 that there was no immunity in Italy for the wife of the diplomatic agent of Colombia to the Holy See in an action on contract, diplomatic agents being subject to jurisdiction of Italian courts except when they have acted as representatives of or at the order of their own state. 23 *Rivista di diritto internazionale* (1931) 563; *Annual Digest*, 1929-30, Case No. 196.

In an earlier case, *Harrie Lurie c. Steinmann* (1927), the Tribunal of Rome held that it had no jurisdiction in a suit against the ecclesiastical counselor to the German Embassy at the Holy See regarding certain property purchased in his behalf. 20 *Rivista di diritto internazionale* (1928) 528; *Annual Digest*, 1927-28, Case No. 246.

In the case of *Balloni c. Ambasciatore del Cile presso la Santa Sede*, a suit against the Chilean Ambassador to the Holy See arising out of an automobile accident involving a car belonging to a Secretary to his Embassy, the Civil Court of Florence in 1934 refused to sustain a plea to the jurisdiction, saying that immunity could not be extended to acts of diplomatic agents and their suites outside of the sphere of their functions. 27 *Rivista di diritto internazionale* (1935) 375; *Annual Digest*, 1933-34, Case No. 164.

M. Diena, *rapporteur* of the subcommittee on diplomatic privileges and immunities of the League of Nations Committee of Experts for the Progressive Codification of International Law, in his report to that Committee said:

"It is first of all necessary to mention that, *in principle*, international usage recognises this immunity of diplomatic agents without distinguishing between acts performed by them in the exercise of their functions and those which they perform in a private capacity.

"Nevertheless, Italian jurisprudence contains two judgments by the Rome Supreme Court of Cassation—one dated April 20th, 1915 (*Rivista di diritto internazionale*, 1915, page 217; *Foro italiano*, 1915, I, 1330); the other dated December 9th, 1921, and published on January 31st, 1922 (*Rivista di diritto internazionale*, 1924, page 173; *Foro italiano*, 1922, I, 334 [344])—pronounced when this Supreme Court was not yet the only final Court of Cassation in the Kingdom—which affirmed the principle that the immunity

of diplomatic agents from jurisdiction in civil questions only extends to acts performed in the exercise of their official functions, and accordingly does not apply to obligations contracted by them in their private capacity. These judgments of the Courts have been strongly criticised, however, even in Italy, from the point of view of international law as it exists to-day, and it cannot be said that in Italy the law is definitely settled in this sense."

League of Nations pub., C.196.M.70.1927.V [1927.V.1], p. 80; 20 A.J.I.L. Spec. Supp. (1926) 148, 150-157.

GIVING OF TESTIMONY

§403

In the case of *Banco de Espana v. Federal Reserve Bank of New York*, an action in replevin to recover certain silver in the United States Assay Office, the plaintiff objected to the receipt in evidence of an affidavit of the former Spanish Ambassador to the United States on the ground that it did not appear that the Ambassador's Government authorized him to make the affidavit and to waive his immunity from testifying. The District Court of the United States for the Southern District of New York found that all the surrounding circumstances seemed to indicate that he made the affidavit with the full knowledge and approval of his Government. The court said:

... The immunity from testifying is something to be claimed by an Ambassador. If he testifies voluntarily, without the authorization of his Government, that is a matter between him and his Government. "It deprives him neither of his competency, nor of his credibility". *United States v. Ortega*, 4 Wash. C.C. 531, 27 Fed. Cas. 359, 361, No. 15,971. A third party has no right to assert it for his own benefit.

28 F. Supp. 958, 972 (S.D.N.Y., 1939).

In a memorandum transmitted to the Treasury Department on June 15, 1939 the Department of State, referring to the instructions to diplomatic officers of the United States contained in Executive Order 4605-A, of Mar. 8, 1927, which states that a diplomatic representative cannot be compelled to testify in the country of his sojourn and that this right is one of which he cannot divest himself except by the consent of his government, said:

"It should be stated that these instructions are not international law. They are merely standing instructions by the Executive to our diplomatic officers in foreign countries. The instructions relate to a situation where it is sought to 'compel' the diplomatic representative to testify, or where he is called upon to testify. It is well settled that diplomatic representatives may not be compelled to testify before the courts of the receiving state.

"Moreover, the instructions relate to the relationship existing between the Government of the United States and the diplomatic representatives of this Government. They are not intended to affect the competency of the representative's testimony in the event of his ignoring the instructions and testifying.

"I Satow, *Diplomatic Practice* (1917) 252; Wheaton's *Elements of International Law* (8th ed. by Dana, 1866) 306, note by Dana; Westlake, *Private International Law* (7th ed. by Bentwich) 279; Report of M. Diena, on Questionnaire No. 3 of the Committee of Experts of the League of Nations, for the Progressive Codification of International Law, relating to diplomatic privileges and immunities, League of Nations Publication, no. C.196.M.-70.1927.V., pp. 78, 81; I Oppenheim's *international Law* (5th ed. by Lauterpacht, 1937) 624, 625; *Procureur de Roi v. Chung and Others*, 57 Clunet, *Journal du Droit International* (1930) 469."

The Secretary of State (Hull) to the Secretary of the Treasury (Morgenthau), June 15, 1939, MS. Department of State, file 311.5254 Bank of Spain/11.

An ambassador, of course, is not subject to process in a foreign court, and there are, perhaps, some matters in respect of which an ambassador's certificate might not be admissible; but, when he certifies to the law of his country or to the personnel and authority of officials of his government, such certificate is clearly admissible as proof of the facts therein set forth.

Agency of Canadian Car & Foundry Co., Limited, et al. v. American Can Co., 253 Fed. 152, 157 (S.D.N.Y., 1918).

In December 1914 the German Ambassador called the attention of the Secretary of State to the fact that an office attendant and messenger of the German commercial attaché in New York had been subpoenaed by the Federal grand jury of New York. He gave the Secretary the names of three other persons employed in the attaché's office "as his assistants and secretaries" in order "to prevent a recurrence of such incidents". The Secretary replied that, as the person had already appeared and testified, it was not necessary to discuss his immunity from subpoena. He pointed out, however, that according to his information, the employee spent only a small part of his time in the employ of the German attaché and that if that was true it would be difficult for the Government of the United States "to afford the same immunities as those enjoyed by regular employees of your Embassy". The Secretary continued:

... I understand that diplomatic privilege is not that of employees and domestics of an embassy, but that of the head of the mission, and that they are clothed with diplomatic immunity so that his personal comfort and state may not be affected by their arrest.

Count von Bernstorff to Secretary Lansing, Dec. 19, 1915, and Mr. Lansing to Count von Bernstorff, Dec. 30, 1915, MS. Department of State, file 701.6211/347; 1916 For. Rel. Supp. 807, 808.

It appears that the Ministry of Foreign Affairs stated, in its note verbale to the Legation of May 20, 1922, that the "Polish law does not go to the extent of establishing that a diplomat may not be cited as a witness in a lawsuit," and that

the Ministry of Foreign Affairs therefore considers that it is proper for it to transmit to your Legation any process issued by a Polish court, summoning a member of the Legation's staff to appear as a witness. It seems, however, that it is admitted by the Polish Government that in such cases the person summoned would not, because of his diplomatic immunity, be compelled to respond to the summons.

It is suggested that you inform the Ministry of Foreign Affairs that under the generally recognized principles of international law the registered personnel of a foreign diplomatic mission are exempt from judicial citation, and that this Government considers that the course followed by the Polish Government in transmitting to the Legation processes issuing out of Polish courts, summoning members of the Legation's staff to appear as witnesses, is not in accord with these principles. You may add, however, that in appropriate cases where the testimony of a member of the Legation's staff is desired in furtherance of the administration of justice you will, upon the receipt of a communication from the Ministry of Foreign Affairs requesting that the question of waiving immunity be considered, take up the matter with your Government.

The Under Secretary of State (Phillips) to the Minister to Poland (Gibson), no. 1404, Oct. 21, 1922, MS. Department of State, file 701.05/101.

In 1922 a telegram was sent to Mr. Bakhmeteff by the Sergeant at Arms of the United States Senate, asking him to appear before the Committee on Education and Labor and saying that the notice should be considered as service of subpoena. The Department of State wrote to the Vice President pointing out that since 1917 the Government of the United States had recognized Mr. Bakhmeteff as the Ambassador Extraordinary and Plenipotentiary of Russia and that under sections 4062 to 4064 of the Revised Statutes he was not required to respond to process.

Secretary Hughes to the Vice President, Apr. 17, 1922, MS. Department of State, file 701.6111/587a.

The Department of State transmitted to the Attorney General in 1923 a summons commanding the Secretary of the Peruvian Embassy in Washington to appear in a court of the District of Columbia to testify on behalf of the United States. The Department pointed out that the Secretary's name appeared on the list of diplomatic officers furnished to the marshal of the District of Columbia and said that in view of the immunity of foreign diplomatic officers from the jurisdiction of local courts it was evident that the summons should not have been served. The Attorney General was requested to bring the matter to the attention of the United States district attorney in order to prevent the service of such papers thereafter on foreign diplomatic officers.

The Third Assistant Secretary of State (Bliss) to the Attorney General, Mar. 8, 1923, MS. Department of State, file 701.2311/202.

Upon the request of the Attorney General the Secretary of State inquired of the German Ambassador in 1916 whether certain members of the German Embassy in Washington would be permitted to testify at a hearing on a criminal charge against a person who had allegedly attempted to extort money from one of them. The desired permission was granted by the German Government "in this particular special case by way of exception". Secretary Lansing to Count von Bernstorff, no. 2204, Nov. 23, 1916, MS. Department of State, file 701.6211/398; Count von Bernstorff to Mr. Lansing, Dec. 5, 1916, *ibid.* /401.

For cases in which the Department of State, upon the recommendation of an American Ambassador, declined to permit a member of an American Embassy abroad to testify, see: The Ambassador in Italy (Griscom) to the Secretary of State (Knox), no. 584, Apr. 20, 1909, and Mr. Knox to Mr. Griscom, no. 299, May 10, 1909, MS. Department of State, file 19354 (request that secretary to military attaché respond to letters rogatory issued by an Italian court in a penal case and received through the Italian Foreign Office); the Ambassador in Peru (Dearing) to the Secretary of State (Stimson), no. 862, June 22, 1931, *ibid.* 823.796 Faucett Aviation Co./17, and the Acting Secretary of State (Castle) to the Embassy at Lima, telegram 46, July 7, 1931, *ibid.* /18 (request that commercial attaché answer a list of questions received through the Peruvian Foreign Office for use in a civil case before a Peruvian court).

The Belgian Foreign Office in 1928 asked that a clerk in the American Embassy in Brussels be permitted to testify in court as a witness to an accident. The Department of State granted consent on the understanding that the business of the mission was not concerned and that the Belgian Government would reciprocate should a similar case arise in the United States. Secretary Kellogg to the Embassy at Brussels, telegram 74, Oct. 27, 1928, MS. Department of State, file 124.553/132.

The Peruvian Foreign Office forwarded to the American Embassy in Lima in 1932 a request of a Peruvian military court for the appearance of the assistant commercial attaché as a witness. The Department of State authorized him to present a statement to the court as a courtesy to the Peruvian Government, provided that the Embassy saw no objection and the case had no political aspect. The Acting Secretary of State (White) to the Embassy at Lima, telegram 44, Aug. 20, 1932, MS. Department of State, file 121.56/763.

The Department of State, in 1933, authorized the Embassy at Rio de Janeiro to waive the immunity of the commercial attaché of the Embassy and to permit him to testify in proceedings against a former clerk in his office charged with embezzlement. The Acting Secretary of State (Phillips) to the Embassy at Rio de Janeiro, telegram 55, June 28, 1933, MS. Department of State, file 121.5632/26. See also the Secretary of State (Hull) to the Ambassador to Belgium (Gibson), telegram 22, Apr. 29, 1933, *ibid.* 121.5655/25 (authorizing commercial attaché to submit deposition as witness to automobile accident).

An inquiry was made of the Department of State in 1935 as to whether the Minister to Egypt could testify in a case before the United States Board of Tax Appeals. The Department stated that, since the

Minister was then in the United States, no permission to testify was necessary.

The Assistant Secretary of State (Phillips) to C. M. Rogerson, Sept. 25, 1935, MS. Department of State, file 123 Fish, Bert/69½.

A Second Secretary of an American Embassy was requested by an attorney in New York to testify as to an execution before him of a release of dower while he was on duty as Consul at the American Consulate General at Paris. The Department said that it perceived no objection to his so testifying in the interest of justice, since the testimony appeared to relate only to the execution of the above-mentioned instrument and to the identification of his signature. The Assistant Secretary of State (Carr) to the Second Secretary of Embassy (Scott), Feb. 20, 1936, MS. Department of State, file 123Sco81/144.

PERSONAL PROPERTY

§404

The Foreign Service Regulations of the United States provide in regard to the private property of Foreign Service officers:

. . . If an officer holds, in a foreign country, real or personal property in a personal as distinguished from an official capacity, such property is subject to the local laws.

For Ser. Reg. U.S. III-1, n. 4, Jan. 1941.

In 1907 the Mexican authorities detained the personal effects of the Third Secretary of the American Embassy upon his departure for a new post, in the absence of a definite and official declaration by the Ambassador that the effects did not include any article the exportation of which was prohibited under Mexican law. The Department of State declared that this was a reasonable demand, saying:

The Department is of the opinion that diplomatic courtesy will be entirely satisfied in case the Mexican Government is willing to accept the declaration of the owner, in lieu of the examination of the baggage of an outgoing attaché of the Embassy. It seems, however, that we could go farther and accept as satisfactory the Mexican proposition that the exemption from examination should be secured through the statement of the head of the Embassy. It appears that all the Mexican Government wishes is a "formal declaration" from the head of the Embassy, and that they are willing that this declaration should be made on the faith of the statement of the outgoing secretary. . . . all that the Mexican Government seems to require is that the Ambassador should satisfy himself sufficiently to make a formal statement that the baggage contains no articles within the prohibition of the law, and does not appear to require personal knowledge on the part of the Ambassador, provided he is satisfied of the correctness of his statement and willing to assume responsibility therefor.

Acting Secretary Bacon to Ambassador Thompson, no. 319, Oct. 9, 1907, MS. Department of State, file 2369/45.

In the case of *The Amazone*, an assistant military attaché to the Belgian Embassy in London moved to set aside a writ for possession of a yacht allegedly owned by him and in his possession and control. As originally issued, the writ was against the yacht but, as amended, was addressed to the owners and parties interested therein. The Probate Division of the High Court of Justice set aside the writ, stating that in effect it commenced an action in detainue against the attaché and that, the property being in his possession and he enjoying immunity, the court had no jurisdiction to go into the matter further.

[1939] P. 322.

In time
of war

The Department of State declared in 1917 that the property of the former German Ambassador to the United States and of the German Embassy, in the possession of a storage company in Washington, did not come under the control of the Alien Property Custodian, since it was entitled to the customary diplomatic immunity which made its disposition subject to the Department of State. The storage company was directed to deliver such property to a representative of the Swiss Legation in charge of German interests in the United States. The Department informed the Swiss Minister that it had no objection to the shipment from the United States of the personal effects of the Ambassador.

Counselor Polk to the Security Storage Company, Dec. 12, 1917, MS. Department of State, file 701.6211/447b; the Secretary of State to the Minister of Switzerland, Sept. 27, 1917, *ibid.* /438.

In reply to an inquiry by the Alien Property Custodian as to the propriety of demanding property in the United States belonging to German, Austro-Hungarian, Bulgarian, and Turkish Consuls, the Department of State stated that it deemed it unwise for him to make demands for property in the United States belonging to persons who, while in this country, were official representatives of a foreign government. Assistant Secretary Phillips to the Alien Property Custodian, Dec. 24, 1917, MS. Department of State, file 763.72113/425; 1918 For. Rel., Supp. 2, p. 334.

On Jan. 19, 1918 the Department of State informed the Alien Property Custodian that it was of the opinion that persons whose names appeared on the Diplomatic List issued by the Department at the time of the severance of relations with the enemy or ally of enemy governments should be accorded the same treatment as regularly accredited diplomatic or consular officers. Mr. Phillips to the Alien Property Custodian, Jan. 19, 1918, MS. Department of State, file 763.72113/469.

On Mar. 26, 1918 the Department wrote to the Alien Property Custodian urging "as a matter of policy and in recognition of diplomatic usages" that the funds in a bank in Washington in the name of the Swedish Legation, Department of Austro-Hungarian interests, be not disturbed unless evidence was presented of the improper use of these funds, in which case

the Department would be pleased to be informed before any action was taken. Secretary Lansing to the Alien Property Custodian, Mar. 26, 1918, MS. Department of State, file 763.72113/466; 1918 For. Rel., Supp. 2, pp. 334, 335.

On Apr. 3 the Department wrote to the Alien Property Custodian that its letter of Jan. 19 (*ante*) referred only to property actually belonging to persons on the Diplomatic List and that if he were satisfied that a certain sum of money allegedly owed to the former German commercial attaché at New York was in fact the property of the German Government, it saw no reason why he was not authorized to demand it. Assistant Secretary Phillips to the Alien Property Custodian, Apr. 3, 1918, MS. Department of State, file 763.72113/504.

The Alien Property Custodian inquired of the Department in May 1918 whether certain real property owned by the German Government in Washington distinct from the site of the German Embassy was subject to seizure. The Department replied that it did not consider that he should take over the property, since it had been acquired as a site for an embassy. Secretary Lansing to the Alien Property Custodian, July 8, 1918, MS. Department of State, file 701.6211/452; 1918 For. Rel., Supp. 2, pp. 337, 338.

The Swedish Minister in charge of Austro-Hungarian interests in the United States wrote to the Secretary of State on August 14, 1918 that the Austro-Hungarian Government was prepared to agree to an arrangement for the reciprocal release at any time, if required, of the furniture and personal effects of the diplomatic members and the naval attaché of the former Austro-Hungarian Embassy in Washington and of the furniture and personal effects of the diplomatic members and the naval and military attachés of the former American Embassy at Vienna. The Secretary replied that this proposal was agreeable to the Government of the United States, which was prepared to conclude a reciprocal agreement in the following terms:

The United States Government and the Imperial and Royal Government agree: viz.,

- 1) to release reciprocally, if required, the furniture and personal effects of the diplomatic members and the military and naval Attachés of the late Imperial and Royal Embassy at Washington and of the late Embassy of the United States of America at Vienna, provided such effects and furniture are previously examined by a representative of the military authorities and found not to contain anything that might serve military purpose;

- 2) to communicate to each other all requests for the release of effects and furniture of the kind, as will be presented to them;

- 3) not to cause any difficulties to the despatch of the articles in question through the forwarding agents authorized by the owners for the transport and to facilitate, as much as possible, the transport into neutral countries at any time that may be found convenient by the military authorities with regard to the means of transportation.

Memorandum from the Swedish Minister (Ekengren) to the Secretary of State (Lansing), Aug. 14, 1918, and memorandum from Mr. Lansing to Mr. Ekengren, Aug. 24, 1918, MS. Department of State, file 701.6311/296.

The Department of State informed the Alien Property Custodian on Apr. 8, 1918 that an automobile belonging to the former Austro-Hungarian naval attaché accredited to the United States at the time diplomatic relations were severed, "which, therefore, was entitled to the customary diplomatic immunity from local jurisdiction extended to the personal effects of diplomatic officers", had recently been sold on instructions from the Austro-Hungarian Government. The Department expressed the opinion that the Alien Property Custodian should not demand the sum realized from the sale but that this "should be turned over to the Swiss [*Swedish*] Legation, in charge of Austro-Hungarian interests in this country". The Second Assistant Secretary of State (Adee) to the Alien Property Custodian, Apr. 8, 1918, MS. Department of State, file 701.6311/294a.

In 1918 the German authorities seized silverware and other personal property belonging to the former American Ambassador, which was stored in Berlin. The Department of State instructed the Legation at The Hague to request the Spanish Embassy to protest against the seizure, pointing out that the personal effects left in this country by former German diplomatic and consular officers accredited to the United States had been respected. The German Foreign Office informed the Spanish Embassy that the confiscation of the silverware, of which it had no previous knowledge, had been immediately suppressed and that the German Government was "always prepared to respect the property of diplomatic and consular officers of the United States left in Germany as long as the American Government" would act in a reciprocal manner. Secretary Lansing to the Legation at The Hague, telegram 1074, Apr. 1, 1918, MS. Department of State, file 123G31/110; *note verbale* from the German Foreign Office to the Spanish Embassy in Berlin, Apr. 12, 1918 (enclosure to despatch 1188 from the Legation at The Hague, Apr. 27, 1918), *ibid.* /113.

The Department of State informed the Alien Property Custodian of the above facts and inquired as to the measures taken with respect to the seizure of the property of Countess von Bernstorff, the wife of the former German Ambassador in Washington. He replied that his office did not intend to take over the personal property of the former German Ambassador and that this policy extended to German and Austro-Hungarian diplomatic and consular officials on duty in the United States at the outbreak of the war. He said that the property of Countess von Bernstorff which had been seized belonged personally to her and that it consisted of stocks and bonds and also some money in a bank. The Assistant Secretary of State (Phillips) to A. Mitchell Palmer, Apr. 2, 1918, MS. Department of State, file 311.6253B45/3; Mr. Palmer to Mr. Phillips, Apr. 12, 1918, *ibid.* /4½.

In January 1922 the Ambassador to Italy informed the Department of State that the Italian Government had not exempted diplomatic officers from the operation of the moratorium enforced by Government decree and civil process in respect to the Banca Italiana di Sconto. The Department authorized the Ambassador to point out the hardships occasioned to American diplomatic and consular officers by the moratorium and to request the Italian Government either to take measures promptly to exempt the American representatives and

their staffs from the moratorium or to find some other means to relieve the situation.

Later, on February 7, the Department—without passing on the question whether exemption of the personal deposits of diplomatic officers from the operation of the so-called moratorium was required by any rule of international law—informed the Ambassador that if, as it understood, payments had been suspended and the affairs of the bank had been placed in the hands of receivers, he might insist on payment of deposits of the Government of the United States made by the American Embassy or Consulates and of personal deposits of members of the Embassy, since payments appeared to have been permitted in the case of deposits of Italian Communes or Provinces as well as of public administrators and charitable organizations. The Department further authorized the Ambassador on July 17 to insist on the carrying out of any assurances that might have been given of payment in full of diplomatic deposits. He was asked not to insist on priority in payment of the private deposits of consular officers unless such priority was accorded similar deposits of consular officers of other countries and was authorized, in the case of official funds deposited by consular officers, to urge as favorable treatment as was accorded deposits of the Italian Government or public corporations.

On June 21, 1923 the Minister of Foreign Affairs informed the Dean of the Diplomatic Corps in Rome—the French Ambassador—that the Italian Government could not accede to the request of the foreign representatives in Rome that the deposits of foreign diplomatic officers in the Banca Italiana di Sconto be fully reimbursed. He said, however, that the Banca d'Italia, as a courtesy to the foreign diplomatic and consular corps of the first category accredited to Italy, was ready to take over the personal credits of these officers with the Banca Italiana di Sconto, thus taking the place of those creditors with the latter bank and fully reimbursing the deposits made for their accounts at that bank.

On December 5, 1923 the Embassy inquired of the Department in reference to Government funds held by American Consulates in Italy, which were due from the Banca Italiana di Sconto, whether it wished the Consulates to sign the demand for credits which was necessary under an Italian court decree and to accept dividends with the reservation of all rights for the complete payment of their credits. The Department replied that, since it was not responsible for the funds held by diplomatic or consular officers abroad, it could not give specific instructions and suggested that in the Consuls' discretion the procedure outlined by the Embassy might be followed.

Secretary Hughes to the Embassy at Rome, telegrams 8, 17, and 101, Jan. 18, Feb. 7, and July 17, 1922, MS. Department of State, file 865.516/24, /30, /65; Foreign Minister Mussolini to the French Ambassador, June 21, 1923 (enclosure in despatch 708 from the Embassy at Rome, July 5, 1923), *ibid.* /101; Mr. Hughes to the Embassy at Rome, telegram 128, Dec. 28, 1923, *ibid.* /108.

The Italian Ambassador inquired of the Department of State in September 1932 whether his Embassy had any recourse in the recovery of a certain sum of money belonging to the Royal Italian Ministry of the Navy and deposited by the Italian naval attaché in the International Exchange Bank of Washington, then in the hands of a receiver. The Department informed the Ambassador that it had ascertained that claims for preference in favor of deposits made by foreign governments in banks such as the International Exchange Bank of Washington closed by order of the Treasury Department had been passed upon and denied by the proper and competent authorities in accordance with law and accepted practice.

The Secretary of State to the Italian Ambassador, Oct. 19, 1932, MS. Department of State, file 701.6511/744.

The Minister of the Irish Free State inquired of the Department of State on April 7, 1933 whether steps might be taken to have a check released which he had purchased in favor of his wife from a bank in Washington, drawn on the Paris office of a New York bank, which had not been honored on account of the suspension of payments by the Washington bank. He also asked that the Department use its good offices to assist him in obtaining possession of a balance still to his credit in that bank. On August 28, 1933 the Department transmitted to the Minister the following statement by the Comptroller of the Currency:

With reference to the deposit mentioned above, it is believed that the principle of inviolability, or immunity . . . in international law as applied to diplomatic agents, would not cover transactions of the character of the one at hand. The account containing these items was carried on the books of the Federal American National Bank and Trust Company under the name of "His Excellency, Michael MacWhite." It was a depositor's account and Mr. MacWhite had made a choice of and entrusted his funds to the instrumentality of this bank and trust company to conduct such transactions as the one involved herein.

However, if, as in the present case, the diplomatic agent has loaned his money to a bank, becoming a creditor-depositor of same, and the bank is compelled to suspend or close for the better protection of all general creditors like himself, it would seem there could be no ground for complaint that he is being given the same consideration as all other like depositors; nor

that because of the better doing of equity among such general depositors, Section 5236 of the U.S. Revised Statutes has provided that there shall be a ratable distribution of the assets.

As to both of these items it would seem, therefore, that the Minister of the Irish Free State is entitled to a claim against the Federal American National Bank and Trust Company, and to be repaid according to the status of his claim, which is plainly that of a general creditor, payable in due course and in such amount as his share will yield in the ratable distribution of the bank's assets among its general creditors.

As stated in the letter to you of May 6th, 1933, neither the United States nor any of its sovereign states can maintain any higher status than that of general creditors in like circumstances, of suspended or insolvent banks as to deposit claims, unless the security provided by law has been taken. It would appear, therefore, that the status of the Minister of the Irish Free State relative to both of these items is that of a general creditor of the Federal American National Bank and Trust Company, and that his claim as to these two items can be classified only in that capacity.

Minister MacWhite to Under Secretary Phillips, Apr. 7, 1933, MS. Department of State, file 701.41D11/120; Secretary Hull to Mr. MacWhite, Aug. 28, 1933, *ibid.* /127.

In April 1933 the Greek Minister wrote to the Department of State in regard to three checks, issued by the Federal American National Bank and Trust Company on the Chase National Bank of New York and payable to the order of the Minister of Foreign Affairs of Greece, which were returned unpaid, the first-mentioned bank being in the hands of a conservator. When the drafts were issued by that bank, payment was made by debiting the savings account of the Counselor and First Secretary of the Greek Legation in Washington. The Greek Minister asserted that the checks should be paid prior to the claims of general creditors of the bank, since the money properly belonged to the Greek Government. The opinion of the Comptroller of the Currency transmitted to the Greek Minister was as follows:

The statutory provisions governing the distribution of the assets of a national bank do not permit the payee of a check or draft to obtain payment in preference to the rights of other general creditors of the bank. *Chicago First National Bank v. Selden*, 120 Fed. 212. Any preference that may be obtained in this instance could, therefore, be granted only on the assumption that the position of the Greek Government entitles it to priority insofar as funds properly belonging to it are concerned.

The United States or the States as sovereigns have been held to be general creditors only of national banks as to deposit claims unless the security provided by law has been taken. *Cook County National Bank v. United States*, 107 U.S. 445.

The Under Secretary of State (Phillips) to the Greek Minister (Simopoulos), May 13, 1933, MS. Department of State, file 701.6811/236. See also the Secretary of State (Hull) to the Chargé d'Affaires ad interim of Chile, Apr. 5, 1933, *ibid.* 701.2511/477; Mr. Phillips to Mr. Simopoulos, Apr. 5, 1933, *ibid.* 701.6811/233; the Secretary of State to the Polish Ambassador, Apr. 10, 1933, *ibid.* 701.60C11/259 (funds deposited by members and employees of Embassy).

PREMISES

§405

The Foreign Service Regulations provide in respect to the inviolability of premises occupied in a representative capacity:

... Premises, which are occupied by a diplomatic representative and members of his staff, either as offices or residences, the goods contained therein, and the records and archives of the mission are inviolable. They cannot be entered, searched, or detained by the local authorities even under process of law.

For. Ser. Reg. U. S. III-1, n. 3, Jan. 1941.

For a collection of authorities on exemptions as to premises, see the comment in the Harvard draft convention on "Diplomatic Privileges and Immunities", 26 A.J.I.L. Supp. (1932) 57.

See the case reported in *Die Deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts* (1933), no. 97 (Court of Appeals of Berlin, 1932), and *Annual Digest*, 1931-32, Case No. 179 (upholding immunity from compulsory mortgage upon property belonging to the Afghan Minister in Berlin, the purpose of the mortgage being to secure a judgment against the Minister covering costs to the defendant in litigation instituted by the Minister in a consular capacity).

In the case of *Angelini c. Governo della Repubblica Francese* the Arbitral Commission at Rome for Leases of Business Premises directed in 1921 that an investigation be made to ascertain whether property ordinarily used as coach-houses and stables was part of the palace which was the seat of the French Embassy, saying that, if this were the case, there would be an irrebuttable presumption of the validity of the defense of jurisdictional immunity. LXXIV *Giurisprudenza italiana* (1922), pt. I, sec. 2, p. 339; *Annual Digest*, 1919-22, Case No. 206.

See the case of *Suède c. Petrococcino* (Civil Tribunal of the Seine, 1929), 59 *Journal du droit international* (1932) 945, and *Annual Digest*, 1929-30, Case No. 198 (no immunity in respect to premises owned by a foreign legation, no part of which had ever been used for legation purposes).

In December 1926 the Hungarian Minister informed the Department of State that he had been treated discourteously by a Metropolitan motorcycle policeman who had entered the Hungarian Legation to protest against the parking of motorcars in a certain space near the Legation. The Minister protested against the policeman's threatening attitude and asked that the Superintendent of the Metro-

politan Police Department personally call and apologize and that he be informed of the punishment meted out to the policeman. The Department informed the Minister on January 12, 1927 that the Superintendent of the Metropolitan Police would call at his residence shortly thereafter in order personally to express regret and apologize for the officer's conduct, and that in due course he would be informed of such measures as might be taken with respect to the officer, in order to avoid a recurrence of the unfortunate incident. The Minister replied that he would consider the incident closed as soon as he was informed of the disciplinary measures taken in regard to the policeman.

Count Széchényi to Secretary Kellogg, Dec. 20, 1926, and Assistant Secretary Wright to Count Széchényi, Jan. 12, 1927, MS. Department of State, file 701.6411/71; Count Széchényi to Mr. Kellogg, Jan. 13, 1927, *ibid.* /73.

In September 1918 the Industrial Housing Commission in Washington requisitioned a house leased and occupied as a residence by the honorary attaché of the Spanish Embassy. The Department informed the Commission that the attaché was a member of the Ambassador's household and expressed the hope that, since under international law dwelling houses of diplomatic representatives were privileged and since under sections 4063 and 4064 of the Revised Statutes the immunities of the diplomatic representative extend to his household, it might be relieved of any embarrassment in the matter and that the requirements of the Commission might be accommodated without recourse to the building in question.

Requisition

The Assistant Secretary of State (Phillips) to the Industrial Housing Commission, Sept. 24, 1918, MS. Department of State, file 701.5211/151b.

In 1938-39 the French Ambassador in Washington gave the consent of the French Government to the construction by the District of Columbia of a tunnel under a portion of the Embassy premises as a part of a sewage system being installed by the District, on the understanding that the French Government would be "fully guaranteed against disturbance of possession and indemnified for any damages or injuries which might be caused to its property" or "to any persons or properties whatever, it not being allowable that the responsibility of this Embassy be involved in any case".

The Assistant Secretary of State (Messersmith) to Count de Saint-Quentin, Dec. 27, 1938, MS. Department of State, file 701.5111/625; Count de Saint-Quentin to Secretary Hull, Jan. 25, 1939, *ibid.* /629; Mr. Messersmith to Count de Saint-Quentin, Feb. 25, 1939, *ibid.* /632; Count de Saint-Quentin to the Acting Secretary of State (Welles), Mar. 17, 1939, and Mr. Messersmith to Count de Saint-Quentin, May 31, 1939, *ibid.* /634; Count de Saint-Quentin to Mr. Hull, June 8, 1939, *ibid.* /638.

Entrance
on legation
property

Special agents of the Internal Revenue Bureau and members of the Metropolitan Police Force, acting under a search warrant, entered rooms occupied by an attaché of the Hungarian Legation. A protest against the violation of the attaché's domicile was made by the Minister. The Secretary of State wrote to the Chargé d'Affaires ad interim of Hungary enclosing a letter from the Major and Superintendent of the Metropolitan Police Department of the District of Columbia, in which an apology was tendered and regret expressed. He also enclosed a letter from the Assistant Secretary of the Treasury, saying that the fact that the rooms were occupied by the attaché was unknown to the officers at the time the search was made, expressing regret, and stating that nothing of an incriminating nature had transpired which would affect the attaché or his standing in any way.

Secretary Hughes to Chargé Pelenyi, Jan. 24, 1924, MS. Department of State, file 811.114 Diplomatic/39 %.

A minor servant of the Second Secretary of the American Embassy in Tokyo was arrested and detained by the Japanese authorities for an alleged theft in a Japanese store. The Japanese Foreign Office requested the permission of the American Ambassador for police to search the servant's room in the Second Secretary's house. The Department of State instructed the Ambassador that it saw no objection to permitting this if an officer of the Embassy were present during the search and if the search were confined to the servant's room and to the purpose for which the permission was asked.

Ambassador Grew to Secretary Hull, telegram 60, Feb. 23, 1937, MS. Department of State, file 123C872/205; Mr. Hull to Mr. Grew, telegram 33, Feb. 23, 1937, *ibid.* /206.

In 1936 members of the Nicaraguan Guardia Nacional entered the residence of two clerks in the American Legation while searching for a Honduran refugee. The Chief of the Guardia Nacional and the Nicaraguan Minister of Foreign Affairs subsequently called at the American Legation and apologized for the incident, and the lieutenant in charge of the searching party also personally apologized.

The Minister in Nicaragua (Long) to the Secretary of State (Hull), no. 269, Sept. 21, 1936, MS. Department of State, file 123 Henry, J. William/13.

. . . the ground occupied by an Embassy is not in fact the territory of the foreign state to which the premises belong through possession or ownership, and . . . in the circumstances, therefore, the American Embassy at Paris is not technically American soil.

The Acting Chief of the Division of Western European Affairs (Gilbert) to Miss Faustine Dennis, Mar. 26, 1930, MS. Department of State, file 124.511/244.

"While the United States Government owns the premises occupied by the American Embassy in Paris, it is not believed that a private contract signed in the Embassy would because of this fact be held not to have been executed on French territory. The immunity from local jurisdiction attaching to a diplomatic mission, sometimes referred to as giving the mission extraterritorial status, is not believed to be susceptible of expansion to the extent of giving a private contract signed on the premises occupied by the mission the status of a contract concluded in the country represented by the mission."

The Legal Adviser of the Department of State (Hackworth) to Charles Davis, May 21, 1936, MS. Department of State, file 851.602/12.

In the case of *Basiliadis* the Court of Appeal of Paris (1st Chamber) in 1922 held that a marriage celebrated in a chapel of the Greek Orthodox Church annexed to the Greek Legation in Paris was not a marriage contracted in a foreign country and was null, as it had not been celebrated according to the provisions of the French law. 49 *Journal du droit international* (1922) 407.

See *Società Moteurs Gnome et Rhône c. Cattaneo* (Italian Court of Cassation, 1930), II *Rivista di diritto commerciale* (1930) 636, 58 *Journal du droit international* (1931) 762, and *Annual Digest*, 1929-30, Case No. 199 (Italian Embassy at Paris held to be French territory in respect to sale of goods there by defendant charged with an infraction of patent rights in Italy).

The Department of State in 1925 refused to comply with a request Crimes of the Estonian Minister for the extradition of one Oskar Tomberg on the ground that the offenses charged against him were not committed within the territorial jurisdiction of Estonia, since they were alleged to have been committed in the Estonian Legation in London. The Department expressed the opinion that the offenses were committed within the territorial jurisdiction of Great Britain.

Secretary Kellogg to Minister Piip, Apr. 15, 1925, MS. Department of State, file 211.601T59/1.

In the case of *In re Trochanoff* the defendant was charged, *inter alia*, with verbally threatening the life of the Bulgarian Minister on the premises of the Bulgarian Legation in Paris. The Criminal Tribunal of the Seine (11th Chamber) assumed jurisdiction and pronounced sentence in the case. 37 *Journal du droit international privé* (1910) 551.

See the case of *Procureur du Roi c. Hier Chung et consorts* (Criminal Court of Brussels, 1929), *Pandectes périodiques* (1930), no. 367, 57 *Journal du droit international* (1930) 469, and *Annual Digest*, 1929-30, Case No. 200 (no immunity in criminal action for third persons committing an offense on legation premises; permission granted by Chinese Minister for Belgian police to enter legation held legal from point of view of Belgian courts, even though according to Minister's service regulations he must consult his Government before renouncing diplomatic immunity).

In 1934 the Supreme Court of the Reich for Criminal Cases held that German courts had criminal jurisdiction over an Afghan student who had murdered the Afghan Minister within the Afghan Legation in Berlin, rejecting the argument that a crime committed against an envoy on legation

premises was a crime committed abroad. 69 *Entscheidungen des Reichsgerichts in Strafsachen* (1936) 54; 64 *Juristische Wochenschrift* (1935), pt. II, p. 1496, no. 14; VI *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* (1936) 408; 64 *Journal du droit international* (1937) 561; *Annual Digest*, 1933-34, Case No. 166.

In time
of war

. . . It [inviolability of a diplomatic agent] is not affected by the breaking out of war between his own country and that to which he is accredited. In such an event, it is the duty of the government to which he is accredited to take every precaution against insult or violence directed against him or any of the persons, whether belonging to his family or suite, covered by the right of inviolability, or against his residence or baggage, and to allow him to withdraw with his suite in all security. In case of need, special facilities should be afforded him, free of expense, and after his departure the embassy house and its contents should be respected.

Satow, *Guide to Diplomatic Practice* (3d ed., London, 1932) 166.

. . . The respective diplomatic envoys are recalled and ask for their passports, or receive them without any previous request; but they enjoy their privileges of inviolability and extraterritoriality for the period of time requisite for leaving the country.

The official residence of a departed envoy is, according to a usage, confided to the protection of another foreign envoy, and the archives, if left behind, are placed under seals. Sometimes a member of the retinue of the departing envoy is left in charge, with the permission of the local Government.

II Oppenheim's *International Law* (6th ed., by Lauterpacht, 1940) 243, 244.

. . . it is improbable that any civilized state would confiscate a house owned by its enemy, if it was acquired for the residence of his diplomatic representative, and used for that purpose in time of peace.

Lawrence, *Principles of International Law* (7th ed., 1923) 400.

TAXATION

INCOME TAXES

§406

The regulations relating to the federal income tax, published in 1940, provide:

Ambassadors and ministers accredited to the United States and the members of their households (including secretaries, attachés, and servants) who are not citizens of the United States, are exempt from the payment of Federal income tax upon their

salaries, fees, or wages. Their income from all sources other than a business carried on by them in the United States is also exempt. These provisions are also applicable to the wives and minor children of foreign ambassadors and ministers and the members of their households, including secretaries, attachés, and servants.

Treasury Regulations 103 (1940: Income Tax), sec. 19.116-I. Identical provisions are found in articles 116-1 of Treasury Regulations 94 (1936) and 101 (1939), respectively (Revenue Acts of 1936 and 1938).

All the regulations relating to revenue acts since that of 1921 have specifically exempted from income-tax obligation the same persons as listed above. Article 83 of Treasury Regulations 45 (1920 ed.), relating to the Income Tax, etc., under the Revenue Act of 1918, mentioned the exemption of only "foreign ambassadors and ministers". It was amended on Dec. 21, 1921 to include "members of their households, including attachés, secretaries, and servants" and "the wives and minor children of foreign ambassadors and ministers and the members of their households". Treasury decision 3266. See the Secretary of the Treasury (Mellon) to the Secretary of State (Hughes), Oct. 22, 1921, MS. Department of State, file 701.0611/133 (saying that the regulations would in practice be construed to include members of ministers' families and households, including attachés, secretaries, and servants); the Assistant Secretary of the Treasury (Shouse) to the Secretary of State (Colby), Aug. 16 and Oct. 2, 1920, *ibid.* /96, /101 (immunity granted chancellor and clerk of Swiss Legation as a member of the official suite of a minister); Mr. Hughes to the French Ambassador (Jusserand), July 6, 1921, *ibid.* /123 (immunity granted minor children of counselor of French Embassy); the Under Secretary of State (Fletcher) to the Belgian Ambassador (Baron de Cartier de Marchienne), Nov. 22, 1921, *ibid.* /137 (immunity accorded wives of duly accredited diplomatic officers). Cf. the Counselor of the Department of State (Polk) to the Danish Minister (Brun), June 6, 1919, *ibid.* /47 (income of wife of Danish attaché from sources within the United States held taxable).

An income-tax ruling of 1920 (Office Decision 710) provided that interest "on funds of foreign legations which are deposited in banks of the United States is not subject to income tax". Treasury Department, Bureau of Internal Revenue, Cumulative Bulletin, no. 3 (July-Dec. 1920), p. 125; Digest of Income Tax Rulings, Digest A (Apr. 1919-Dec. 1930, inclusive), p. 518.

The Commissioner of Internal Revenue wrote to the wife of the Second Secretary of the British Embassy in Washington, who was herself an American citizen and whose marriage occurred on March 15, 1926, that in general citizens of the United States wherever resident were subject to the income tax imposed under the Revenue Act of 1926 but that as the wife of the Second Secretary she was privileged to claim diplomatic immunity, extending to taxation on income from investments in stocks and bonds and from interest on bank balances. If, by reason of her election to remain an American citizen, it was said, she should voluntarily file and return the tax, the Treasury Department would accept the payment, but it did not request her to

Wives

take this action. If immunity with respect to the year 1926 was claimed on the basis of her diplomatic status, he continued, it would relate to income received both prior and subsequent to her marriage.

The Commissioner of Internal Revenue to Mrs. Louise S. Thompson, Apr. 6, 1927 (enclosure to memorandum of the Legal Adviser of the Department of State, Feb. 11, 1935), MS. Department of State, file 701.0611/494.

The Treasury Department took the position in 1931 that the phrase "members of their households" used in article 641 of Treasury Regulations 74 included the wives of clerks of foreign embassies and legations in Washington and that they were therefore exempted from the payment of Federal income tax to the extent provided in that article. The Acting Secretary of the Treasury (Mills) to the Secretary of State (Stimson), June 18, 1931, MS. Department of State, file 123 Eustis, Henry W. /23.

. . . under the rules of international law, Mrs. -----, as a citizen of the United States, is subject to income tax on income from whatever source derived, but . . . , in view of her diplomatic status as the wife of the Chancellor of the . . . Legation, she is, during the period of her retention of her diplomatic status, immune from suit or other proceeding for the collection of the tax, irrespective of the source from which the income is derived.

The Acting Secretary of the Treasury (Gaston) to the Secretary of State (Hull), Jan. 3, 1940, MS. Department of State, file 701.5411/281.

American
employees
of foreign
missions

. . . the rulings of your Department that members of diplomatic suites who are citizens or subjects of the appointing or of a third State are exempt from the payment of American taxes on the income received by them for such services, but that American citizens employed in a similar capacity are not exempt from the payment of American income taxes on the compensation derived by them for such services, seem to be in accord with the generally accepted principles of international practice.

The Under Secretary of State (Phillips) to the Secretary of the Treasury, June 20, 1923, MS. Department of State, file 701.0611/231.

The Treasury Department informed the Department of State on July 13, 1932 that employees of the French Embassy in Washington (except those who were citizens of the United States) were exempt from Federal income tax with respect to their income, except income derived from any business in the United States, provided that their names appeared on the list of employees of the French Embassy prepared by the Department of State in accordance with the provisions of section 4065 of the Revised Statutes.

The Assistant Secretary of the Treasury (Douglas) to the Secretary of State (Stimson), July 13, 1932, MS. Department of State, file 701.0611/396.

The employees of foreign Embassies and Legations in the United States who are not American citizens are exempted from

the payment of Federal income taxes on the salaries, fees and wages received by them in compensation for their official services, and on the income derived by them from investments in stocks and bonds in the United States and from interest on bank balances in the United States.

The Secretary of State (Hughes) to the Swedish Minister (Wallenberg), Aug. 26, 1924, MS. Department of State, file 701.0611/189.

Employees of United States Embassies, Legations, and Consulates, who are not citizens of the United States, are . . . liable to Federal income tax only with respect to income from sources within the United States. As the compensation received for services rendered as employees of such Embassies, Legations, and Consulates is not income from sources within the United States, the employees are not liable to Federal income tax with respect to such compensation.

Alien
employees
of American
missions

The Assistant Secretary of the Treasury to the Secretary of State, Jan. 4, 1927, MS. Department of State, file 701.0611/300.

"Inasmuch as the question of taxation involved merely your personal servant, the Department deems it unwise to maintain that [he] is exempt from the operation of the German income tax by the sole fact of his employment as a domestic in the American Embassy at Berlin.

"The German Government, while recognizing the diplomatic immunities guaranteed by international law, insists that its nationals in dependent positions are not entitled to exemption from the application of municipal laws and regulations, which action of the German authorities has been concurred in by the Diplomatic Corps. The question can hardly be considered an open one, for the acquiescence of the United States in the application of the German laws relating to insurance against disability and old age would seem to preclude this Government from raising the question of principle in its present form. (See Foreign Relations, 1901, pp. 172-173)."

Acting Secretary Wilson to Ambassador Hill, no. 190, June 12, 1909, MS. Department of State, file 19888/-2.

. . . American diplomatic officers are not exempt from income tax. Their net income subject to tax should be computed in the same manner as the net income of other American citizens is computed. The rent of the personal residence of the Minister is not a deductible item but the rent for any business offices which he is required to pay and for which he is not reimbursed may be deducted. The cost of entertaining is considered a personal expense and is not deductible although it is recognized that a certain amount of entertaining is incident to the position.

American
diplomatic
officers

The Assistant Secretary of the Treasury (Moss) to the Secretary of State (Hughes), July 3, 1923, MS. Department of State, file 701.0611/173.

In 1925 the Department of State wrote to the Spanish Ambassador that it was informed by the Secretary of the Treasury that the exemption from tax of the income from securities (accorded to members of the Diplomatic Corps accredited to the United States) in-

Property
held for
profit

cluded the profit derived from the sale of such securities and that, as the selling of real estate owned for residential purposes was clearly not carrying on a business, any profit derived from the sale of such property by members of the Diplomatic Corps would be exempt from tax. It was further stated that, if real estate were acquired and held for profit, the ownership thereof constituted private business and the profit from the sale of such real estate was accordingly subject to tax.

Under Secretary Grew to Ambassador Riaño y Gayangos, Aug. 28, 1925, MS. Department of State, file 701.0611/269.

The Treasury Department informed the Department of State on Aug. 25, 1922 that the wife of the Spanish Ambassador was subject to income tax upon rents from her property located in the State of New York. The Secretary of the Treasury (Mellon) to the Secretary of State (Hughes), Aug. 25, 1922, MS. Department of State, file 701.0611/156. See also Treasury Department, Bureau of Internal Revenue, Internal Revenue Bulletin, Cumulative Bulletin 1-2 (July-Dec. 1922), p. 74; *ibid.*, Digest of Income Tax Rulings, Digest A (Apr. 1919-Dec. 1930, inclusive), p. 519.

EXCISE TAXES

§407

In a circular note to the chiefs of mission in Washington on October 12, 1932 the Department of State said:

Miscellaneous federal excise taxes are imposed by the Revenue Act of 1932 [47 Stat. 169] on telegraph, telephone, radio and cable facilities; admissions, dues and initiation fees; transfers of stocks and bonds; conveyances; sales of produce for future delivery; passage tickets; foreign insurance policies; safe deposit boxes; checks; electrical energy and use of boats.

Under the application of the principles of international law exempting from taxation ambassadors, ministers and other duly accredited diplomatic representatives of foreign governments, together with the members of their families living with them and members of their households, including attachés, secretaries, clerks and servants who are not citizens of the United States, all such diplomatic representatives, together with the other personnel above-mentioned, are entitled to exemption from the taxes in question.

The Secretary of State to the chiefs of mission in Washington, Oct. 12, 1932, MS. Department of State, file 701.0611/405A.

The Federal tax on checks mentioned above terminated on Jan. 1, 1935. 48 Stat. 768. The tax on the use of boats terminated on June 30, 1934. *Ibid.* 769.

... duly accredited diplomatic representatives of foreign governments, members of their families living with them and members of their households, including attachés, secretaries, clerks

and servants not citizens of the United States, are entitled to exemption from payment of internal revenue taxes when such taxes would fall directly upon such persons. The exemption also extends to the manufacturers' miscellaneous excise taxes where any such person is a party to the taxable transaction and it may be assumed that the burden of the tax would fall directly upon him. The exemption does not extend to cases where the person entitled to exemption is not a party to the taxable transaction, such as in the case of the purchase by a diplomatic representative of an automobile from a dealer. The tax imposed by Title IV of the Revenue Act of 1932 on the manufacturer, producer or importer having accrued and become payable prior to the purchase, no exemption is available.

The exemption also extends to the stamp taxes imposed under Title VIII of the Revenue Act of 1926, as amended, where the person entitled to exemption is a party to the transaction which is made the subject of the tax, and applies notwithstanding the fact that the tax is imposed on either party to the transaction. In such case the transaction itself is exempt, for if the tax were to be asserted against the nonexempt party, the burden of the tax could be shifted to the exempt party, and such assertion of the tax would be contrary to the rule of international law under which foreign diplomatic representatives are entitled to exemption not only from the tax but from the direct burden of the tax.

The Acting Secretary of the Treasury (Hanes) to the Secretary of State (Hull), Oct. 3, 1938, MS. Department of State, file 701.48A11 Taxation/6.

In determining the question of exemption of diplomatic and consular representatives from payment of a stamp tax on steamship tickets, it is immaterial, unless otherwise provided by treaty, whether the cost of the ticket is borne by the foreign government or by the individual.

Steamship
tickets

The Under Secretary of the Treasury (Ballantine) to the Secretary of State (Stimson), Mar. 7, 1932, MS. Department of State, file 701.06/273.

On December 30, 1924 the Secretary of the Treasury informed the Secretary of State that a passage ticket issued to secretaries and to diplomatic officers of foreign legations passing through the United States to and from their posts of duty in foreign countries was exempt from stamp-tax liability.

Foreign
diplomatic
officers
in transit

The Secretary of the Treasury (Mellon) to the Secretary of State (Hughes), Dec. 30, 1924, MS. Department of State, file 701.0611/238. See also Mr. Mellon to Secretary Kellogg, Oct. 17, 1928, *ibid.* /334.

In 1933 it was held that members of the Chinese Delegation who had been in Washington at the invitation of the United States and who were sailing to attend the Economic Conference at London were not subject to the stamp tax on passage tickets.

Delegates
to London
Conference,
1933

The Under Secretary of State (Phillips) to the Secretary of the Treasury (Woodin), May 17, 1933, MS. Department of State, file 550.81 Wash./540; the Secretary of the Treasury (Woodin) to the Secretary of State (Hull), May 25, 1933, *ibid.* /539.

**Tax on
checks:
reciprocity**

A French law required payment of a stamp tax of 50 centimes on each check issued. The French authorities in 1936 refused to grant an exemption from this tax on checks issued by the American District Accounting and Disbursing Officer against the account entitled "State Department District Accounting and Disbursing Office, Paris, France". The Department of State instructed the Chargé d'Affaires ad interim in Paris to inform the French Foreign Office that, during the period in which a tax of two cents on each check issued was collected in the United States under the Revenue Act of 1932, a member of a diplomatic mission in Washington was exempted from the payment of the tax on checks when the checks were signed by him or had his signature stamped thereon. The desired exemption was granted, but it was limited to checks drawn upon the account of the American Government and did not extend to checks drawn by members of the Embassy staff on their individual accounts.

The Assistant Secretary of State (Carr) to the Chargé d'Affaires ad interim at Paris (Wilson), no. 1379, June 15, 1936, MS. Department of State, file 121.635 Paris/556; Counselor Wilson to Secretary Hull, no. 175, Dec. 8, 1936, *ibid.* /635.

**State
sales tax**

The wife of a foreign minister in Washington, in making purchases from various firms in the city of New York in 1936, was required to pay a sales tax. The Department of State was informed by the State authorities that as a matter of policy an exemption from the sales tax would be given to the members of the households of ambassadors and ministers of foreign countries in the United States. It was stated to be necessary in this case for the minister's wife to apply to the Deputy Comptroller of Emergency Taxes in New York city for a letter of exemption; whereupon a certificate of exemption would be forwarded to her, which would enable her to make purchases in New York city without being charged a sales tax.

MS. Department of State, file 701.6411 Taxation/22.

In 1937 the Attorney General of Ohio held that the sales-tax law of that State was not applicable to purchases made at a store in Cleveland, Ohio, by the wife of a foreign minister in Washington. MS. Department of State, file 701.6411 Taxation/30.

**French
sales tax**

In 1918 a French sales tax was imposed on all purchases of supplies, office furniture, or other goods for the American Embassy's official use, and every member of the Embassy staff was subject to this tax on his living expenses. The Department of State instructed

the Ambassador that the question as to whether diplomatic officials should be exempted depended upon whether the tax was a direct or an indirect one; that diplomatic officers were exempt from direct taxation but not from indirect taxation; that taxation on the person of a diplomatic officer, his personal effects, and property belonging to him as representative of his government would be direct taxation to which he would not be subject; but that the addition of 10 percent by way of tax on the purchase price of commodities would in the Department's opinion be indirect taxation from which he would not be exempt, though after purchase such commodities would be immune from taxation as personal effects of the agent or property belonging to him as representative of his Government.

The Acting Secretary of State (Polk) to the American Embassy at Paris, telegram 5205, Aug. 3, 1918, MS. Department of State, file 701.0651/-.

In response to a despatch from the American Minister to Poland in 1923 relating to a Polish luxury tax, the Department of State said that it was informed by the Treasury Department that luxury and sales taxes in the United States applying directly to the individual did not attach in cases of sales to ambassadors, ministers, and diplomatic representatives of foreign governments properly accredited to the Government of the United States. This ruling, it was stated, was made as a matter of international comity rather than as the result of any provision of law. The Treasury Department added, it was said, that other taxes imposed on manufacturers of and dealers in certain articles were held to apply to an ambassador or other diplomatic representative of a foreign country on whom the tax fell indirectly. The Department declared that, in view of the foregoing, it considered that the Minister would be warranted in claiming, on the basis of reciprocity, exemption from the payment of taxes applying directly to the individual, but that he would not be warranted in claiming exemption from the payment of indirect taxes falling on an ambassador or other diplomatic officer because the price was made high enough to contemplate the tax or was added by the manufacturer or dealer to the price of the article as a specific item.

Assistant Secretary Wright to Minister Gibson, no. 1512, July 9, 1923, MS. Department of State, file 860C.512/8. To the same effect, see the Third Assistant Secretary of State (Wright) to the Minister in Czechoslovakia (Einstein), no. 128, June 22, 1923, *ibid.* 701.0660f/2.

Federal taxes on tires and automobiles are imposed under section 602 and section 606, respectively, of the Revenue Act of 1932 and are upon "articles sold by the manufacturer, producer, or importer." [47 Stat. 169, 261.] The taxes are measured by the

Reciprocity

Taxes on manufacturers, producers, and importers

price at which the articles are sold, and are to be paid by the manufacturer, producer, or importer.

It is, accordingly, the opinion of this Department that under the rules of international law diplomatic representatives, members of their families, and their staffs, are entitled to exemption from the taxes . . . where such articles are purchased from the manufacturer, producer, or importer thereof.

The Secretary of the Treasury (Mills) to the Secretary of State (Stimson), Dec. 1, 1932, MS. Department of State, file 701.0611/415.

"The taxes on the sales of automobiles and jewelry provided for in Sections 600 and 604 of the Revenue Act of 1924 are taxes imposed upon the manufacturers of automobiles and upon the vendors of jewelry. [43 Stat. 253, 322, 324.] In the collection of such taxes the Government looks to the manufacturer and to the vendor for the payment of the tax and not to the purchasers of the articles. For this reason and the further reason that the price of the article sold is a matter of negotiation between the vendor and the purchasers, the appropriate authorities of this Government have taken the position that no exemption from the payment of these taxes can be granted to the manufacturer or vendor by reason of the fact that the sale is made to a diplomatic representative of a foreign government." The Secretary of State to the Chargé d'Affaires ad interim of Czechoslovakia, Nov. 18, 1924, MS. Department of State, file 701.0611/236a.

"... a foreign diplomatic representative may properly claim exemption from the tax on an automobile which he purchases from the manufacturer or importer, but where the purchase is made from a dealer other than the manufacturer or importer, no exemption is available since, in such case, the tax accrues and becomes payable upon the sale by the manufacturer or importer prior to the purchase from the dealer and the amount thereof is merely included by the dealer as a part of the purchase price, the same as any other item of business expense." The Secretary of the Treasury (Morgenthau) to the Secretary of State (Hull), June 5, 1934, MS. Department of State, file 701.2511/504.

"Diplomatic officers of foreign countries residing in the United States are entitled to exemption from sales taxes, such as those imposed on gasoline, automobile tires and inner tubes if they are parties to the importation or sale which is made the subject of the tax, that is to say, if the gasoline, automobile tires or inner tubes are imported by them or purchased by them from the producer or manufacturer for their personal or official use." The Assistant Secretary of State (Messersmith) to diplomatic officers, Aug. 19, 1937, diplomatic serial 2829, MS. Department of State, file 701.0611/553a.

It is understood that some foreign governments levy a transmission tax on transportation. Sections 500 of the Revenue Acts of 1917 and 1918 imposed a similar tax on transportation charges. Article 99 of Treasury Regulations 49, relating to such tax provided that ambassadors, ministers and properly accredited diplomatic representatives of any foreign government to the United States were exempt from the payment of the taxes on amounts

paid for transportation services rendered them within the United States.

The Assistant Secretary of State (Messersmith) to diplomatic officers, Aug. 19, 1937, diplomatic serial 2829, MS. Department of State, file 701.0611/553a.

"The railways in the United States are privately owned and no special privileges are extended to diplomatic or consular officers with respect to travel." The Secretary of State to the Chargé d'Affaires ad interim of Egypt, Apr. 15, 1938, MS. Department of State, file 701/225.

In the event the German Embassy at Washington actually imports gasoline into the United States for the exclusive use of the Embassy and the members thereof enjoying customs exemption, and such imported gasoline is stored for the Embassy by commercial dealers separately from other gasoline owned by them, it is held that the Embassy, under the principles of international law, will be exempt from the payment of the Federal tax of 1 cent per gallon imposed on gasoline under section 3412 of the Internal Revenue Code.

Importation

The Acting Secretary of the Treasury (Gibbons) to the Secretary of State (Hull), Apr. 11, 1939, MS. Department of State, file 662.11241/96.

In 1922 the Danish Government imposed a restaurant tax of 10 percent; the Belgian Minister, as Dean of the Diplomatic Corps in Copenhagen, demanded the exemption of foreign diplomats from its operation. The Department of State instructed the Minister to Denmark that "the addition of ten per cent to restaurant bills, by way of a tax on the purchase price of commodities would, in the Department's opinion, be in the nature of indirect taxation, from which diplomatic officers could not properly claim exemption".

Restaurant

Assistant Secretary Bliss to Minister Prince, no. 124, Aug. 11, 1922, MS. Department of State, file 701.0659/5.

The Counselor of the French Embassy in 1933 received as a dividend on shares of a distillery company a warehouse receipt giving him the right to a certain quantity of whisky held by a company in Louisville, Kentucky. He expressed the desire through the French Ambassador at Washington to obtain a certificate of exemption to be sent to the company holding the liquor to enable him to withdraw it and ship it tax-free. The matter was referred to the Treasury Department, which informed the Department of State on April 7, 1934 that the tax imposed under section 600 (a) of the Revenue Act of 1918, as amended by section 900 of the Revenue Act of 1926 and the Liquor Taxing Act of 1934, on distilled spirits to be paid when withdrawn from the warehouse was due and payable by the distiller except when withdrawn for some tax-free purpose au-

Tax on
distilled
spirits

thorized by law. In these circumstances, it was said, a certificate might not legally be issued to the Counselor authorizing the withdrawal of the spirits without payment of the Internal Revenue tax and without affixing the stamps to the containers as contemplated by the revenue laws.

The Acting Secretary of the Treasury (Gibbons) to the Secretary of State (Hull), Apr. 7, 1934, MS. Department of State, file 701.5111/487.

At a meeting of the Diplomatic Corps at Cairo in 1936 the question of the payment of an annual license fee assessed for the operation of radio-receiving sets in Egypt was discussed. It was agreed that the fee involved should not be considered a tax but a charge for a service rendered. The Department instructed the Minister in Egypt that, since the fee was imposed for a service rendered and involved no question of American capitulatory rights, it saw no objection to its collection from American diplomatic and consular officers in Egypt. It stated, however, that, if in the future the fee was increased and made a source of revenue to the Egyptian Government, the situation would be different.

Assistant Secretary Carr to Minister Fish, no. 183, July 20, 1936, MS. Department of State, file 701.0683/10.

TAXES ON REAL PROPERTY

§408

In regard to the taxation of real property in the District of Columbia, the Department of State said in a circular instruction:

Property in the District of Columbia owned by foreign governments for Embassy and Legation purposes is exempt from general and special taxes or assessments. Property owned by an Ambassador or Minister and used for Embassy or Legation purposes is exempt from general taxes but not from special assessments for improvements. The payment of water rent is required in all cases, as this is not regarded as a tax but the sale of a commodity.

The Assistant Secretary of State (Messersmith) to diplomatic officers, Aug. 19, 1937, diplomatic serial 2829, MS. Department of State, file 701.0611/553a.

Private
residence

In 1925 the Mexican Chargé d'Affaires informed the Department of State that he had bought certain premises for his residence and requested that this be made known to the authorities of the District of Columbia so that the property might be exempted from taxation. The competent authorities of the District stated that, since the premises were assessed as the private residence of the person in ques-

tion, it knew of no law which would authorize exemption from taxation.

Under Secretary Grew to Ambassador Téllez, Mar. 31, 1925, MS. Department of State, file 701.1211/355.

The Department of State informed the assessor of the District of Columbia in 1928 that, while it was customary to grant exemption from taxation upon a reciprocal basis to houses owned by foreign governments or by heads of their diplomatic missions in the United States and used by the latter for embassy or legation purposes, it did not appear "to be customary to extend such exemption to cover private residences owned and occupied by counselors, secretaries, or other members of foreign diplomatic missions".

The Solicitor for the Department of State (Hackworth) to W. P. Richards, Feb. 2, 1928, MS. Department of State, file 701.2311/273.

In 1921 the Swedish Minister inquired whether certain premises belonging to the estate of the late Swedish Minister (Ekengren) might be held to be exempt from taxation pending the settlement of the estate. The property had formerly been exempted from taxation on the theory that it was used for Legation purposes, although owned by the late Swedish Minister. It had recently been abandoned for Legation purposes and was listed for rent or sale by four real-estate firms. The President of the Board of Commissioners of the District of Columbia stated that there was no law which would justify exemption of the property from taxation.

The Secretary of State to the Swedish Minister, May 20, 1921, MS. Department of State, file 701.0611/118.

In 1922 the Board of Commissioners of the District of Columbia had placed on the exempt list the property of Count Széchényi, then Hungarian Minister to the United States. The Department of State informed the Hungarian Minister in 1934 that, as the office of the assessor of the District of Columbia had ascertained that the property was then being rented and as Count Széchényi's diplomatic mission to the United States had terminated, it was understood that this property would be returned to the taxable list.

The Acting Secretary of State to the Minister of Hungary, Jan. 18, 1934, MS. Department of State, file 701.6411/190.

The German Embassy in Washington, on October 28, 1939, informed the Department of State that the former Austrian Legation, which had become the property of the German Government, had been rented as of October 1, 1939 to the Royal Danish Minister as his residence and as the Chancery of the Danish Legation. In acknowledging the note

the Department said that, since both under treaty and under the pertinent provisions of the Code of the District of Columbia the property in question was, as of October 1, no longer entitled to exemption from taxation, the appropriate authorities had been advised of the contents of the German Embassy's note.

The Secretary of State to the German Chargé d'Affaires ad interim, Nov. 8, 1939, MS. Department of State, file 701.6211/1103.

**School
tax**

The commercial attaché of the Italian Embassy in Washington, who owned a home in the village of Scarsdale, New York, claimed exemption from a school tax imposed on his property by the village. The Department of State was of the following opinion:

The School Tax in New York State, as in the other States of the Union, is an ad valorem property tax levied upon land in accordance with its assessed value. It is exactly on a par with the taxes levied on landed property in the several states for the support of hospitals, prisons, asylums, poor houses, and other public institutions. These taxes are payable by the land owner irrespective of any use which he personally or the members of his family may make of the institutions in question. The theory upon which support of schools by general taxation is based, in this country, is that the education of children is a matter which touches the interests not only of the individual parent, but of the community at large. In view of the nature of this tax, I do not see how we can request the appropriate authorities of the State of New York to grant Signor Angelone exemption from this tax.

On June 4, 1931 the Department wrote to the attorney for the village of Scarsdale that there did not appear to be any principle of international law or of international comity which would prevent the appropriate authorities from collecting the tax in question.

The Under Secretary of State (Castle) to the Italian Chargé d'Affaires (Di Muriaglio), May 9, 1931, MS. Department of State, file 701.6511/687; Mr. Castle to William C. White, June 4, 1931, *ibid.* /650.

**Leased
property**

In 1929 a legation in Washington inquired whether the proportion of the taxes applicable to the three floors of a building occupied by it under lease could be refunded, since the rent impliedly included the District taxes paid by the landlord on the building. The Department of State replied that it would not be possible to render the assistance asked and enclosed with its communication a memorandum in which it was said:

. . . As long ago as May 22, 1912, and it is clear that there are other earlier cases, this office prepared a memorandum reviewing the authorities and reaching the conclusion that:

"No authorities have gone so far as to lay down the rule that, irrespective of ownership, property used for diplomatic pur-

poses should be exempt from taxation. Such exemption would clearly seem unwarranted even under a most liberal interpretation of the general principle that a diplomatic officer . . . enjoys certain immunities in order that he may not be interfered with in the discharge of his official duties. Whatever might be the proceedings employed in collecting the tax under such circumstances, no process would be served on the diplomatic officer occupying the rented property, and in no way would there be any attempt to subject him to local jurisdiction. The possibility that he would be disturbed in the possession of the premises under his lease as a result of the title passing from the owner in case of such owner's failure to pay the taxes would be extremely remote, and such a situation would likely have no bearing on the general principle in question."

The Assistant Secretary of State (Castle) to the Minister of the Irish Free State (MacWhite), Mar. 15, 1929, MS. Department of State, file 701.41d11/93.

During negotiations for the purchase by the Government of the United States of certain property in Vienna for legation purposes, the Minister in Austria was informed that under Austrian law transfer taxes on property acquired by a foreign government for legation purposes might be waived on the basis of reciprocity but that in the absence of specific treaty provisions an exchange of notes on the subject was required. The Department of State authorized the Legation to inform the Austrian authorities by note that the Government of the United States imposed no transfer tax in connection with the acquisition by foreign governments of real estate in the United States for embassy or legation purposes, nor was any Federal or local tax imposed on such property after such acquisition. The Austrian Minister of Foreign Affairs replied to the Legation's note, stating that the property acquired by the Government of the United States would be free of all transfer taxes and that no other taxes of any kind would be levied on it. He stated, however, that this exemption would not include charges for the collection of garbage, sewage, and supply of water, which represented payment for work done by municipal institutions. The Department was of the opinion that, since such charges appeared to cover the cost of services actually performed for the Legation and since it was the practice of the Viennese authorities to charge individual householders for such services, there was no basis for claiming an exemption.

Transfer
tax

Service
charges

The Minister in Austria (Messersmith) to the Secretary of State (Hull), telegram 1, Jan. 3, 1936, and Mr. Hull to Mr. Messersmith, telegram 1, Jan. 11, 1936, MS. Department of State, file 121.631/90; Mr. Messersmith to Mr. Hull, no. 690, Feb. 10, 1936, and the Assistant Secretary of State (Carr) to Mr. Messersmith, no. 135, Mar. 27, 1936, *ibid.* /105.

The Department of State instructed the Embassy in Buenos Aires in 1929 that it might request the Argentine Minister of Foreign Affairs to

waive, on the basis of reciprocity, payment of a transfer tax and a tax on a draft of the United States Treasury in connection with the purchase of Embassy property in Buenos Aires. The exemption from the taxes in question was granted. Secretary Stimson to the Embassy at Buenos Aires, telegram 70, July 23, 1929, MS. Department of State, file 124.351/122; Ambassador Bliss to Mr. Stimson, no. 612, July 29, 1929, *ibid.* /126. See also Secretary Kellogg to the Legation in Persia, telegram 3, Jan. 18, 1929, MS. Department of State, file 124.911/86.

**Fee for
recording
deeds**

In 1925 the Department of State wrote informally to the Egyptian Minister that it was informed by the office of the recorder of deeds of the District of Columbia that in respect to embassy or legation property no exception was made in the matter of the required fee for recording deeds and that it was informed by the office of the collector of internal revenue that no exception was made in the matter of revenue stamps on deeds.

Assistant Secretary Wright to Minister Mahmoud Samy Pasha, Dec. 2, 1925, MS. Department of State, file 701.0611/274a. See also the Acting Secretary of State (Grew) to the Legation at Prague, telegram 35, Oct. 27, 1924, *ibid.* 124.6011/43.

**Assess-
ments—
Embassy**

The authorities of Tokyo made certain assessments in 1932 against the American Embassy in connection with improvements on streets bordering the Embassy property. It was stated that the assessment was in no way a tax; that it was apportioned among the persons deriving material benefit from public works carried out for the common good; and that it was similar in character to expenses for public roads, sanitation, etc. The Department authorized the Ambassador to pay the charge since it did not believe "that any exemption could be claimed on the ground of comity alone in view of the lack of uniformity in the practice of countries generally on the subject under reference". It was suggested, however, that the Ambassador inform the Foreign Office that, while the assessment would be paid, the Japanese Embassy property at Washington was exempt from the payment of similar assessments, even though the Embassy property should be definitely benefited by street improvements.

The Under Secretary of State (Castle) to the Ambassador to Japan (Grew), no. 61, Aug. 13, 1932, MS. Department of State, file 124.941/1071.

The city authorities of Ottawa in 1928 proposed to assess property-holders on a street where the new American Legation office building was to be located, for the construction of an asphalt pavement. The Department of State instructed the Legation that the action of the Commissioners for the District of Columbia in regard to property owned by foreign governments for legation purposes in Washington was governed by the act of Congress approved March 3, 1903 which

exempted from assessments for improvements "property owned by foreign governments for legation purposes"; that the provisions of this act would justify its continuing to urge, on the basis of reciprocity, an exemption from the payment of the special paving tax; but that, since it was not prepared to insist that legation properties were exempt under international law from the payment of special assessments, it would take steps toward granting a special allotment to the Legation to meet the tax if the Canadian Government declined to grant an exemption. The Under Secretary of State for External Affairs in Canada subsequently informed the Legation that the property became subject to the obligation before title was transferred to the American Government, and that the obligation would therefore continue in any case.

Secretary Kellogg to the Legation at Ottawa, telegram 32, Apr. 4, 1928, MS. Department of State, file 124.421/46; Assistant Secretary Johnson to Minister Phillips, no. 218, May 2, 1928, *ibid.* /69; the Secretary of the Legation in Canada (Newson) to Mr. Kellogg, no. 400, May 8, 1928, *ibid.* /78.

The city of Berlin in 1932 requested the payment of a provisional assessment on American Embassy property for street-cleaning. The Department of State took the position that under international law there was no immunity from assessments for such services but that, since the German Embassy in Washington was exempt not only from all taxes but also for assessments for improvements, such as sewers and sidewalks, and from assessments for costs of street-sweeping, the Embassy should endeavor to obtain waiver of this charge on the basis of reciprocity. The German Foreign Office, however, refused to grant a waiver, saying that the fees were not taxes but constituted payments for labor rendered by the municipality.

The Under Secretary of State (Castle) to the Embassy in Berlin, telegram 40, Apr. 15, 1932, MS. Department of State, file 124.621/261; the Counselor of the Embassy (Gordon) to the Secretary of State (Stimson), no. 1842, July 26, 1932, *ibid.* /275.

The Italian Ambassador, in April 1921, inquired as to the course to be followed to obtain the exemption of the residence owned and occupied by the Counselor of Emigration of the Italian Embassy from an assessment for paving the alley in the rear of the property. The Department replied that it was "aware of no existing grounds for exempting property owned by a member of an Embassy or Legation and occupied by him as a residence from local assessments made to cover an appropriate share of the cost of improvements to a street, alley or sidewalk passing the property which can but have the effect of enhancing its value".

Assess-
ments—
residence

The Secretary of State to the Italian Ambassador, Apr. 25, 1921, MS. Department of State, file 701.0611/111.

Tenants
in Legation
building

In 1933 the Department of State, in an instruction to the Chargé d'Affaires ad interim in Prague, said with regard to certain taxes allegedly due in respect to tenants living in the Legation building, of which the American Government was the owner:

It appears from these statements of the Foreign Office that the tax is imposed on the tenants, and that the proprietor is merely the agent for collecting the tax from them and transmitting it to the City of Prague. Obviously one sovereign state is not subject to the laws of this nature of another state, and it is not within the power of either the Government of Czechoslovakia or the City of Prague to impose, by law or ordinance, a duty upon the Government of the United States to collect from the tenants in its Legation building at Prague and transmit to the local government taxes due from them. In so far, therefore, as the tenants which the American Legation is required to retain against its will and to its detriment are concerned, the Government of the United States must refuse to act as such a collecting agent.

The Under Secretary of State (Castle) to the Chargé d'Affaires ad Interim in Prague (Benton), no. 225, Jan. 17, 1933, MS. Department of State, file 124.60F1/342.

TAXES ON PERSONAL PROPERTY

§409

In regard to the exemption from taxation in the District of Columbia of personal property of foreign diplomatic and consular officers, the Department of State has said:

The members of foreign diplomatic missions and foreign consular officers in the District of Columbia are exempt in the District from the payment of personal property taxes on automobiles and other personal property, either tangible or intangible, owned by them.

The Assistant Secretary of State (Messersmith) to diplomatic officers, Aug. 19, 1937, diplomatic serial 2829, MS. Department of State, file 701.0611/533a. See also the Secretary of State to the Hungarian Minister, Aug. 11, 1930, *ibid.* /365.

"... accredited diplomatic officers, together with the members of their households, including secretaries, attachés, clerks, and servants who are not citizens of the United States, are exempt from personal taxation, since the imposition of personal taxes upon such persons would be contrary to the practice followed generally by the nations of the world in respect of persons attached to diplomatic missions." The Secretary of State to the Dominican Minister, Aug. 31, 1937, MS. Department of State, file 701.3911/358.

American citizens are not exempt from the payment of such taxes by reason of their employment at foreign missions in Washington, and should be required to pay the personal tax upon their motor cars.

Citizens of foreign countries employed at the Embassy or Legation in Washington of the country of which they are nationals and whose names are included on the *List of Employees* would be exempt from the payment of personal taxes upon their automobiles. The applications for motor car license tags should be stamped by the mission and the Department of State before exemption from taxation is granted.

Employees of
diplomatic
missions

With reference to other employees who are not citizens of the United States or the country of the mission in which they are employed, the question of exemption from taxation must be determined in each individual case. If such employees are brought to the United States by a Chief of Mission or accompany the Chief of Mission to this country, they are admitted into the United States in an official or diplomatic status and accordingly should be exempt from the payment of personal taxes as an act of international comity. An alien resident of the United States who, as you state, is "fortunate enough to be employed by an embassy or legation of a foreign country" would not be exempt from the payment of personal taxes. The Department will continue to exercise extreme caution before stamping the application of a person in this category to ascertain that the applicant should be exempt from the payment of personal taxes.

The Chief of the Division of Protocol of the Department of State (Sumnerlin) to C. A. Russell, Deputy Assessor of the District of Columbia, Jan. 8, 1939, MS. Department of State, 701.0611/583.

In 1918 the Department of State transmitted to the Board of Commissioners of the District of Columbia a communication from the High Commissioner of the French Republic stating that several members of the High Commission had received notices relative to a personal tax due to the District of Columbia. The Department observed that the High Commissioner assumed that these notices had been sent by mistake, and pointed out that the Secretary of the Treasury had held on February 12, 1918 that the personnel of the High Commission, by the same right as that of embassies, was exempted from the payment of the Federal income tax. The Board of Personal Tax Appraisers of the District informed the Department on June 7, 1918 that the corporation counsel was of the opinion that the members of the Commission were entitled to exemption from taxation upon their personal property located in the District and that the assessments in question had been stricken from the record.

French High
Commission

The Assistant Secretary of State (Phillips) to the Board of Commissioners of the District of Columbia, May 14, 1918, MS. Department of State, file 701.0611/14; William Richards, of the Board of Personal Tax Appraisers, to Mr. Phillips, June 7, 1918, *ibid.* /17.

Stenographer
of Mexican
agency

In 1929 the Mexican Ambassador wrote to the Department of State concerning the taxation by the Government of the District of Columbia of the personal property of a stenographer, a Mexican citizen, attached to the Mexican Agency of the General Claims Commission, United States and Mexico. The Department pointed out that there had been no general agreement between the United States and Mexico to accord to members of the Mexican Agency or secretariat of the Commission exemption from taxation on property in the United States or to accord to members of the American Agency exemption from taxation on property in Mexico and that, in its opinion, the District authorities were legally within their right in making the assessment in question. Subsequently the authorities of the District of Columbia expressed the view that a stenographer of the General Claims Commission could not properly be classed as a member of the official household of the Mexican Ambassador and entitled to exemption.

The Secretary of State to the Mexican Ambassador, Nov. 25, 1929, MS. Department of State, file 701.06/255.

The president of the Board of Commissioners of the District of Columbia on Nov. 29, 1939 informed the Secretary of State that it had been the custom to issue dog licenses without cost to all legations provided a letter from the legation was sent to the collector of taxes with a request for the license. President Hazen to Secretary Hull, Nov. 29, 1939, MS. Department of State, file 701.5611 Taxation/13.

State per-
sonal taxes

The Department of State wrote to the Governor of Maryland in 1929 saying that in its estimation exemption from taxation on personal property should be extended to all the members of the official staff of a foreign mission and expressing the hope that steps might be taken to insure that the members of suites of diplomatic missions in Washington residing in the State of Maryland would be exempt from all personal taxation.

Secretary Kellogg to the Governor of Maryland, Feb. 26, 1929, MS. Department of State, file 701.0611/340.

On May 9, 1922 the Department of State transmitted to the Governor of Virginia a note from the British Ambassador in regard to a request addressed to a clerk to the military attaché of the British Embassy that he remit to the treasurer's office of Arlington County, Virginia, a certain sum to cover a personalty tax; the Ambassador asked that information concerning the clerk's status be communicated to the competent authorities of Virginia in order that similar requests might be discontinued. Secretary Hughes to the Governor of Virginia, May 9, 1922, MS. Department of State, file 701.0611/147. To the same effect see Mr. Hull to the Governor of Virginia, Mar. 25, 1933, *ibid.* 701.4111/813 (with reference to an archivist and cipher officer).

In May 1939 the Egyptian Minister asked whether arrangements could be made to have a waiver or consent issued by the Federal

Estate Tax Bureau of the United States Government so that funds and securities belonging to the late Egyptian Minister in Washington, and placed by him in a bank in Washington, might be transferred from the United States. The Treasury Department was of the view that the provisions of the Federal estate-tax law applied to his estate to the same extent that they applied to the estates of other non-resident aliens and that therefore no transfer certificates could be issued until an estate-tax return had been filed on behalf of the decedent's estate and any tax shown to be due had been paid.

The Secretary of State to the Minister of Egypt, June 21, 1939, MS. Department of State, file 701.8311/239.

As an act of international courtesy and on a reciprocal basis, the Department of Vehicles and Traffic of the District of Columbia issues, free of charge, special diplomatic license plates for automobiles belonging to members of the foreign diplomatic corps in Washington and the members of their families. The fee for tags in the District of Columbia is composed of (1) charge for license plates and registration cards; and (2) tax upon motor cars, both of which are waived by this Government. Gratuitous drivers' permits are also granted to foreign diplomatic officers residing in Washington and the members of their families.

Fees and
taxes on
automobiles

The Assistant Secretary of State (Messersmith) to the Mexican Ambassador (Nájera), Mar. 23, 1938, MS. Department of State, file 701/224.

The Department of State informed the Minister to China in 1931 that, with a few exceptions, the issuance at Washington of diplomatic tags and licenses was restricted to those persons whose names appeared in the Diplomatic List. The exceptions referred to included consular officers attached to missions and chancellors of embassies or legations who received their appointments from the heads of their respective states. The Department stated that it saw no objection to the Minister's continuing to request the municipal government at Peiping to issue tags and licenses for motorcars belonging to the American officers whose names appeared on the diplomatic list and to the commissioned officers of the Legation guard, and also for such motorcars and motortrucks as were the property of the United States. It expressed the opinion that requests by the Legation for the issuance of diplomatic tags and licenses for motor vehicles owned otherwise than as stated above should be discontinued. Assistant Secretary Castle to Minister Johnson, no. 419, Mar. 10, 1931, MS. Department of State, file 701.0693/6.

On Apr. 2, 1923 the Department of State informed the chiefs of mission in Washington that the Board of Commissioners in the District of Columbia had caused special automobile tags to be issued for their use. It had been made clear to the police department, it was said, that the absence of a diplomatic tag in no way changed the status of the other members of the Diplomatic Corps who were entitled to the same diplomatic privileges then extended to them, the tag simply serving as an extra precaution against any inconvenience to the head of the embassy or legation. The Secretary of State to the chiefs of mission at Washington, Apr. 2, 1923, MS. Department of State, file 701.0011/51d.

CUSTOMS

§410

The Customs Regulations of the United States (1937) provide:

Baggage

ART. 432. *Baggage*.—(a) Upon application to the Department of State and appropriate instructions from the Treasury Department in each instance, the privilege of admission free of duty without entry shall be extended to the baggage and effects of the following representatives of foreign governments, and their families, suites, and servants, provided the Governments which they represent grant reciprocal privileges to American officials of like grade accredited thereto or en route to or from other countries to which accredited.

(1) Ambassadors, ministers, and *chargés d'affaires*; and secretaries, and naval, military, and other *attachés* of embassies and legations, high commissioners, consular officers and trade representatives, accredited to this Government or en route to or from other countries to which accredited; and

(2) Other high officials of foreign governments and such distinguished foreign visitors as may be designated by the Department of State.

(b) In the absence of special authorization therefor from the Department prior to the arrival of representatives of foreign governments enumerated in paragraph (a) (1), the privilege may be extended to their baggage and effects upon presentation of their credentials or other proof of their identity.

(c) Foreign ambassadors, ministers, and *chargés d'affaires*; and secretaries, and naval, military, and other *attachés* of foreign embassies and legations shall not be detained or inconvenienced, and their baggage and effects shall remain inviolate. Every proper means shall be afforded them to facilitate their passage through ports of the United States.

(d) The privilege of admission free of duty without entry of their baggage and effects may also be extended to representatives of this Government of the classes enumerated in paragraph (a) (1), including Treasury *attachés* and Treasury representatives, together with their families, suites, and servants, returning from their missions abroad, upon the production of their credentials. . . . The free entry authorized hereunder shall not extend to alcoholic beverages, with respect to which the persons enumerated in this paragraph shall receive no other exemption from duty and internal-revenue tax than is allowed returning residents of the United States in accordance with article 420 of these regulations.

(e) If by accident or unavoidable delay in shipment, the baggage or other effects of a person of any of the classes mentioned in this article shall arrive after him, the same may be passed free of duty, under the conditions specified above, upon satisfactory proof of ownership.

ART. 433. *Imported articles*.—(a) Costumes, regalia, and other articles, including office supplies and equipment, for the official use of members and attachés of foreign embassies and legations, consular officers, and other representatives of foreign governments, may be admitted free of duty provided the countries which such persons represent accord like privileges to corresponding officials of the United States. . . . Articles for the official use of representatives of foreign governments not listed in T.D. 41046, or any amendment thereof, shall be admitted free of duty only upon the receipt of instructions from the department, which will be issued only when application therefor is made through the Department of State.

Imported
articles

(b) Packages bearing the official seal of a foreign government with which the United States has diplomatic relations, accompanied by certificates under such seal to the effect that they contain only official communications or documents, may be admitted free of duty without customs examination.

(c) The privilege of importing free of duty articles for their personal or family use may be granted to (1) members and attachés of foreign embassies and legations, and (2) consular officers and other representatives of foreign governments to whom the privilege is accorded under special agreements between the United States and the countries which they represent; but in either case the privilege may be granted only upon the department's instructions in each instance which will be issued only upon the request of the Department of State. The special agreements referred to are published in the Treasury Decisions.

For a collection of material on exemption from customs duties, see the comment in the Harvard draft convention on "Diplomatic Privileges and Immunities", 26 A.J.I.L. Supp. (1932) 107.

"Exemption from the payment of custom duties is not a right that may be demanded by a diplomatic representative but is a courtesy extended to him." W. R. Castle, Jr., of the Division of Western European Affairs of the Department of State, to the Secretary of the Swiss Legation (Jenny), Apr. 15, 1920, MS. Department of State, file 701.0611/89.

A mother, sister, or other relative of a foreign diplomatic officer who is acting as a member of his family is entitled to the free entry privileges.

Family

The Assistant Secretary of the Treasury (Moss) to the Secretary of State (Hughes), Dec. 18, 1923, MS. Department of State, file 701.0611/186.

. . . Representatives of foreign governments and their suites coming to the United States on temporary official missions, although not having diplomatic status, are entitled to the free entry of their personal effects at the time of arrival, and the heads of such missions may import free of duty any merchandise intended for their personal or official use.

Temporary
mission

Ibid.

Trade commissioners

... foreign trade commissioners and assistant trade commissioners assigned to the United States are granted free entry upon a basis of reciprocity for their baggage and effects upon arrival and return to their posts in this country after visits abroad but do not enjoy the privilege of importing articles for their personal use free of duty subsequent to their latest arrival.

The Assistant Secretary of State (White) to the Secretary of the Treasury, Nov. 15, 1930, MS. Department of State, file 637.11241/66. See Treasury decision 43175 (1929).

The Treasury Department instructed collectors and other officers of the customs, on June 8, 1926, that as trade commissioners have a status similar to consular officers they should accord the usual customs courtesies and free-entry privileges to American trade commissioners returning from their posts abroad, upon production of their credentials. Treasury decision 41823.

Clerks

In general, clerks of foreign embassies and legations in Washington do not enjoy the privilege of free entry or importation except so far as free entry of certain goods for residents and non-residents of the United States is provided for in the customs regulations. However, upon request from a foreign mission for "customs facilities" for a member of its clerical staff, the Treasury Department is asked to expedite passage for that employee through the customs.

Secretary Stimson to the Legation at Peking, telegram 323, Oct. 2, 1929, MS. Department of State, file 701.0611/353. See also the Assistant Secretary of State (Wright) to the Ambassador to Mexico (Sheffield), no. 200, Feb. 21, 1925, *ibid.* /242.

Special reciprocal agreements have been entered into with the Governments of Germany, Cuba, and Sweden granting free entry in certain cases. The Secretary of State to the German Ambassador, Dec. 20, 1923, MS. Department of State, file 662.11241/39; the Assistant Secretary of State (White) to the Cuban Chargé d'Affaires ad interim (Baron), May 31, 1932, *ibid.* 637.11241/88; the Under Secretary of State (Castle) to the Swedish Minister (Boström), Jan. 5, 1933, *ibid.* 658.11241/19.

See also the agreement effected by exchange of notes on Oct. 11, 1940 between the United States and Brazil, providing for reciprocal customs privileges for the diplomatic and consular representatives of each country and their clerical personnel. *Ex. Agree. Ser.* 185.

Honorary consuls and employees

The privilege of free entry is not extended to honorary consuls and honorary employees of diplomatic missions and consulates, either accredited to the United States or en route to and from their posts in other countries. However, upon the request of the mission concerned in each instance, arrangements may be made for an expeditious passage of such persons through the customs upon their arrival at United States ports.

The Assistant Secretary of State (Rogers) to the Mexican Ambassador (Puig), July 19, 1932, MS. Department of State, file 701.1211/549.

The Counselor of the Italian Embassy in Japan was extended the "usual courtesies, including the free entry of his baggage and effects without examination" upon his arrival at San Francisco in 1909. In transit

The Acting Secretary of the Treasury (Coolidge) to the Secretary of State (Knox), Apr. 3, 1909, MS. Department of State, file 18966/1.

The Treasury Department in 1936 authorized the customs officers in New York to extend the usual customs courtesies and free-entry privileges to the wife of the Brazilian Minister in Warsaw, who was expected to arrive in transit at that port.

The Assistant Secretary of the Treasury (Gibbons) to the Secretary of State (Kellogg), Feb. 20, 1926, MS. Department of State, file 701.3231/16.

... the classification of persons attached to a diplomatic mission for the purpose of determining who are entitled to the privilege of free importation is usually made on the basis of reciprocity, taking into consideration the treatment accorded by foreign governments to persons attached to American diplomatic missions. No discrimination is made against the servants as they do not come within the grade of personnel of a diplomatic mission to whom the privilege of free importation is generally granted for all purposes. Servants

Acting Secretary Castle to Representative Schafer, June 27, 1931, MS. Department of State, file 811.114 Diplomatic/261.

Chiefs of Mission are not limited in the value of merchandise which they may import for their personal or family use, and all members of diplomatic staffs—counsellors, secretaries, and attachés—enjoy the same customs privileges as do Chiefs of Mission. Value of imports

The Acting Secretary of State (Carr) to the Spanish Ambassador (De Cárdenas), Aug. 25, 1933, MS. Department of State, file 701.0611/436.

Supplies intended for official use of foreign embassies and legations and foreign consulates in the United States, such as office furniture and office material, may be entered free of duty. Exhibits of the products of foreign countries, *if forming a part of the permanent exhibitions* in the consulates may also be admitted free of duty. Supplies

The granting of these customs exemptions to diplomatic and consular officers of foreign countries is conditional upon the granting of similar exemptions to American diplomatic and consular officers by these countries.

Any material imported by a foreign government to be used in constructing an embassy or legation building is exempted from the payment of customs duties.

The Assistant Secretary of State (Messersmith) to American diplomatic officers, Aug. 19, 1937, diplomatic serial 2329, MS. Department of State, file 701.0611/553a.

The Department of State informed the Embassy in Tokyo in 1930 that the Government of the United States would admit free of duty on a basis of reciprocity any building material imported for the repair of foreign-government-owned buildings as well as material for the construction of new buildings.

Secretary Stimson to the Embassy at Tokyo, telegram 181, Oct. 4, 1930, MS. Department of State, file 125.6431/52. To the same effect, see the Acting Secretary of State (Castle) to the Embassy at Paris, telegram 208, May 18, 1931, *ibid.* 125.6971/291.

In 1939 the Venezuelan Ambassador requested that the collector of customs at New York be authorized to change from the special entry at the New York World's Fair ground to the admission free of duty a shipment of Venezuelan woods left over from the Venezuelan pavilion at the New York World's Fair so that it might be sent to Washington to be used in the construction of the Embassy buildings. This authorization was issued.

The Secretary of State to the Venezuelan Ambassador, May 29, 1939, MS. Department of State, file 701.3111/298.

The Egyptian Legation was granted exemption from customs duties on various objects which the members of the Legation staff desired to purchase for their personal use from the Egyptian exhibit at the Century of Progress Exposition in Chicago. The Treasury Department stated:

"If articles are to be withdrawn from the custody authorized by Public Resolution No. 56 [47 Stat. 905] for the personal use of members of the official staff of the Egyptian Legation and a formal request is first received by this Department through your Department for remission of the duties payable on withdrawal, the Treasury Department will authorize the withdrawal of the articles free of customs duties in accordance with its usual practice with respect to duties payable on an import transaction to which an Egyptian diplomatic officer is a party." The Acting Secretary of State to the Egyptian Chargé d'Affaires ad interim, July 13, 1933, MS. Department of State, file 701.FE & CC/45.

Diplomatic officers may import gasoline free of duty at any time during their official residence.

With regard to importations of gasoline it may be stated, however, that there is no authority under which duty may be refunded or remitted for gasoline purchased by a diplomatic or consular officer from an importer or dealer in this country after the release of the commodity from Government custody or control.

The Assistant Secretary of State (Welles) to the Brazilian Ambassador (Aranha), Nov. 9, 1934, MS. Department of State, file 701.0611/481.

Mail parcels

Mail parcels for the members of families of Chiefs of Mission, including their wives, and for all other members of diplomatic staffs and their families are always examined by the customs

authorities. Such parcels are admitted free of duty upon compliance with the rules set forth in the Department's circular note of April 19, 1926, to foreign missions at Washington. . . .

Packages arriving other than by mail addressed to Chiefs of Mission are admitted free of duty without examination. The customs authorities reserve the right to examine packages arriving other than by mail addressed to subordinate members of diplomatic staffs or members of their families, but inasmuch as such packages are covered by the usual shipping papers setting forth their contents they are practically always passed without customs inspection.

The Chief of the Division of Latin American Affairs (Wilson) to the First Secretary of the Peruvian Embassy (Mendoza), May 13, 1932, MS. Department of State, file 701.FE & CC/24. For the circular note of Apr. 19, 1926, see *ibid.* 611.00241/87.

Mail parcels containing articles for the personal use of members of the families of Chiefs of Mission, or for members of the diplomatic staffs of Missions or their families, are admitted free of duty upon a request for free entry through the Department of State. A notice of the arrival of parcels will be sent by the Customs Bureau of the Washington Post Office to addressees of mail parcels within the aforementioned category, and it is requested that the original notice be forwarded to the Department of State in each instance with the usual note requesting free entry of the parcel in question.

Scaled mail parcels addressed to persons other than Chiefs of Diplomatic Missions are retained by the Postmaster, who will send a notice to the addressee advising him of the arrival of the parcel and requesting him to appear and open the parcel in the presence of postal and customs officers or to furnish written authority whereby it may be opened by the said officers for the examination of its contents.

Inasmuch as Article 426 of the United States Customs Regulations of 1931 provides for the free entry, on a basis of reciprocity, of articles for the *official* use of diplomatic and consular officers, it is not necessary for the Treasury Department to instruct collectors of customs regarding the free entry of such articles, and therefore unnecessary for requests for their free entry to be made through the Department of State. A note stating that the articles are for official use and requesting their free entry may be addressed by the Mission or Consulate concerned direct to the local customs officers.

The Secretary of State to the chiefs of mission in Washington, Apr. 9, 1934, MS. Department of State, file 701.FE & CC/63.

Article 361 (a), (b), and (c) of the Customs Regulations of 1937 provides:

Articles addressed to ambassadors, ministers, and *chargés d'affaires*, representing foreign governments in the United States,

shall be delivered to the addressees without submission to customs officers.

. . . Articles intended for the personal use of members of the families of ambassadors, ministers, and *chargés d'affaires*; or for members and attachés of foreign embassies and legations or members of their families, may be admitted free of customs duty, upon the Treasury Department's instructions to the collector of customs in each instance, which instructions will be issued only upon request of the Department of State.

. . . Articles addressed to members and attachés of foreign embassies and legations and to consular and other representatives not heretofore mentioned, bearing the official seal of a foreign government or inclosed in its official envelope, and indicating from casual examination, without breaking the seal, that they contain only official communications or documents, shall be forwarded immediately to the addressees without customs examination. Sealed and unsealed articles addressed to "consular and other representatives" referred to in this paragraph, when believed to contain dutiable merchandise, shall be subject to usual customs treatment.

A Secretary to the Italian Embassy at Washington ordered some linens from a foreign country. When they arrived in the United States he had become Italian Vice Consul at Pittsburgh. The Embassy requested free entry for the parcel since the linens were ordered while he was still a member of the Embassy staff. This was refused by the Treasury Department on the ground that Italian consular officers in the United States were not entitled to free importation for their personal use and that the exemption from duty on imported merchandise depended upon the status of the officer at the time of importation and not at the time the goods were ordered.

The Assistant Secretary of the Treasury (Gibbons) to the Secretary of State (Hull), Jan. 9, 1936, MS. Department of State, file 611.65241/143 %.

Disposal of
effects
admitted
free

In an instruction to the Minister to Bolivia in 1907 in respect to a protest published by several merchants in La Paz alleging the abuse by diplomatic representatives of the privilege accorded by the Bolivian Government for the free introduction of furniture, etc., the Department of State said :

. . . The privilege of free importation of household effects by diplomatic and in some cases consular officers, on condition of reciprocity, is well grounded in international law, and the practice of disposing of the effects of a retiring envoy is sanctioned by common usage. Any perversion of the privilege to the commercial profit of the envoy during his term of residence would of course be an abuse tending to make him unacceptable to the government to which he is accredited.

Acting Secretary Bacon to Minister Sorsby, no. 94, July 1, 1907, MS. Department of State, file 7347/-8.

A member of an embassy in Washington, upon being transferred to Japan, left most of his furniture with a storage company in Washington. After his death the Department of State informed the embassy that no difficulties would arise with regard to the payment of customs duties on such articles of furniture as might be sold.

J. C. Holmes, of the Division of Protocol and Conferences in the Department of State, to Secretary Broadmead, Feb. 12, 1936 (personal), MS. Department of State, file 701.0611/524.

... the Treasury Department accords free entry as an act of international courtesy only upon the assumption that the articles which are the subject of this privilege will not be dealt with on any commercial basis while they remain in the United States. When free entry has been properly accorded, the goods are exempt from any further customs regulation or control.

The Assistant Secretary of the Treasury (Gibbons) to the Secretary of State (Hull), Nov. 24, 1936, MS. Department of State, file 701.6111/879.

The exemption from payment of duty on the importation of merchandise by diplomatic officers for their use or the use of their families provided for in the United States Customs Regulations of 1937—

includes free entry for their automobiles, new or old, since the Treasury Department has ruled that automobiles are classed as personal effects and therefore are entitled to free entry under the provisions of the United States Customs Regulations. This Government asserts no claim on automobiles imported by diplomatic officers assigned to the United States when such automobiles are used by the officers importing them and are subsequently sold.

Automobiles

The Assistant Secretary of State (Messersmith) to the Mexican Ambassador (Nájera), Mar. 23, 1938, MS. Department of State, file 701/224.

OTHER TAXES

§411

A so-called Callao port tax was imposed by the Peruvian Government in 1935 on steamship passages, freight, and baggage, which the Peruvian authorities claimed they were entitled to collect from members of the Diplomatic Corps at Lima. The matter was referred to the Treasury Department by the Department of State, and the former replied on July 25, 1936:

Port tax

It appears that the taxes in question are imposed on all travelers using the facilities of the port works, consisting of wharves, docks, and piers. The taxes are collected by the steamship companies handling the business and are paid over to the Frederick Snare Corporation, a private corporation which constructed the port works, under a contract with the Peruvian

Government, the terms of which authorized that corporation to administer the port works and apply the proceeds of the taxes in payment of the cost of construction and administrative expenses.

No authority has been found dealing specifically with the question of whether diplomatic representatives are entitled to exemption from such service charges to the same extent as from taxes. However, in an analogous situation, namely, the constitutional exemption of the United States from taxation by the various states, the distinction between taxes and service charges has been clearly recognized and the general rule, as gathered from the authorities, appears to be that the exemption from taxation to which the United States is entitled under the constitution extends to service charges only where they are imposed in the exercise of the taxing power, rather than in the enforcement of a contractual obligation. *Sands v. Manistee River Improvement Co.*, 123 U.S. 288; *Packet Company v. Keokuk*, 95 U.S. 80; *Transportation Company v. Parkersburg*, 107 U.S. 691; *Huse v. Glover*, 119 U.S. 543; 24 Comp. Dec. 45.

The exemption to which foreign diplomatic representatives are entitled under the recognized principles of international law would seem to rest upon a basis no less broad than the exemption from state taxation to which the United States is entitled under the constitution, and consequently it would follow by analogy that the diplomatic representatives would be entitled to exemption from the payment of service charges only if those charges were exacted under the taxing power.

In the light of the above it may be stated that if the exaction in the instant case is one imposed pursuant to the taxing power, whether as compensation for the use of port facilities or otherwise, thus constituting an involuntary exaction, it would stand on the same footing as an ordinary tax and the exemption would apply, whereas, if it is an exaction representing compensation for use based on contract, no exemption could be granted. From the information you have furnished with respect thereto, this Department is of the opinion that the exaction imposed by the Peruvian Government falls in the latter category, and that if such charges were imposed by the United States government, foreign diplomatic representatives would not be entitled to exemption therefrom.

The Department instructed the Chargé d'Affaires ad interim in Peru that it was believed that he would not be warranted in protesting against the collection of these charges by the Peruvian Government.

The Acting Secretary of the Treasury (Taylor) to the Secretary of State (Hull), July 25, 1936, and Assistant Secretary Welles to Chargé Dreyfus, no. 922, Aug. 12, 1936, MS. Department of State, file 823.841/7.

Foreign diplomatic representatives accredited to the United States and the employees of foreign diplomatic missions in the United

States who are not citizens thereof and who are recognized by the Department of State as having a diplomatic status are exempt from tax under the Social Security Act. Social-security tax, etc.

The Acting Secretary of the Treasury (Magill) to the Secretary of State (Hull), Oct. 2, 1937, MS. Department of State, file 811.5074 Foreign Dip. and Con. Officers/52; Mr. Magill to Mr. Hull, Mar. 25, 1938, *ibid.* /65.

As to social-security taxes in foreign countries and their application to American diplomatic and consular employees, see *post*, ch. XV, §438.

It is . . . the opinion of this Department that diplomatic representatives of Norway and such consular officers of Norway as are not engaged in professional business, trade, manufacture or commerce are exempt from tax on shipments containing articles which they import for their personal use, including lift vans carrying such shipments.

The Secretary of State to the Norwegian Minister, Oct. 26, 1936, MS. Department of State, file 701.0611/545.

The German Ambassador, in December 1927, requested free entry for a lift-van containing household goods belonging to the Counselor of the Swiss Legation which the widow of the late German Ambassador wished to use for the shipment to Germany of the latter's effects. The Treasury Department authorized the customs officer at Washington, D. C., to waive the assessment of duty on the van, although it was not being exported by the Legation importing it and had remained in the United States longer than the usual 30-day period. It was stated that similar action would not be taken in the future unless it were established that the Government of the diplomatic officer making the request extended or was willing to extend such privilege to American diplomatic officers.

The Secretary of State to the German Ambassador, Apr. 27, 1928, MS. Department of State, file 701.0211/728.

The German Ambassador in 1922 requested that American consular officers in Germany be instructed to waive payment of the usual fee for the certification of invoices covering household goods and furniture of German diplomatic and consular officers in the United States. The Secretary of State replied that it was not feasible to comply with his request since the invoice fees mentioned were mandatory under the Consular Regulations. Certification of invoices

The Secretary of State to the German Ambassador, Dec. 5, 1922, MS. Department of State, file 701.0611/160.

The American Chargé d'Affaires ad interim in Yugoslavia was required to pay an *octroi* or municipal customs tax on an automobile taken by him from the United States to Yugoslavia. The Yugoslav Octroi

Government refused his request for reimbursement of the tax on the ground that under Yugoslav law exemption from taxation was only accorded to heads of mission and not to members of their official suites. The Department of State in an instruction to the Chargé, after quoting the statement contained in IV Moore's Digest 676 to the effect that diplomatic exemption might not be claimed by way of usage and reciprocity from municipal *octroi* duties, which was based on a Departmental instruction of January 20, 1896 to the American Legation in Rome, stated:

In view of the Department's above quoted decision in this matter, it does not consider that it can properly instruct you to make representations to the Yugoslav Government that you should be exempt, *as a matter of right*, from the payment of the "octroi" duties in question. It desires you, however, to inform the Yugoslav Foreign Office that all Yugoslav diplomatic officials in this country enjoy absolute exemption from taxation on cars brought by them into the United States and that, therefore, this Government considers that on the ground of comity all American diplomatic officers in Yugoslavia should enjoy similar privileges and be exempt, *inter alia*, from the payment of "octroi" duties on cars brought by them into the city of Belgrade. You will also inform the Yugoslav Foreign Office that if the Yugoslav Government is not prepared to exempt American diplomatic officers from the payment of the "octroi" duties in question, this Government will have to reconsider its position with regard to the total exemption from taxation at present enjoyed by Yugoslav diplomatic officials in this country in connection with automobiles owned by them.

Under Secretary Grew to Chargé Paddock, no. 586, Sept. 8, 1925, MS. Department of State, file 701.0660h/3.

MISCELLANEOUS CASES

§412

Immigration

Section 3 of the Immigration Act of 1917 (39 Stat. 874, 878) provides for the exclusion of aliens afflicted with a dangerous contagious disease. It provides further that nothing in the act "shall be construed to apply to accredited officials of foreign Governments, nor to their suites, families, or guests". The minor son of an accredited official of the Chinese Government was denied admission into the United States because he was found to be afflicted with a dangerous contagious disease. A demurrer to a petition for a writ of *habeas corpus* was overruled by the District Court of the United States and the petitioner discharged on the basis of the statutory provisions above referred to.

Ex parte Cheuk Gar Lim, 285 Fed. 396 (N.D. Calif., 1922).

The Attorney General, on May 8, 1919, expressed the following opinion to the Secretary of State with respect to certain questions which the Secretary had asked in regard to the act approved March 3, 1917 known as the "Reed amendment" (39 Stat. 1069)—later made applicable to the District of Columbia (40 Stat. 1151)—relating to the transportation of liquor in interstate commerce, and in regard to the act approved November 21, 1918 (40 Stat. 1045, 1047) prohibiting the importation of intoxicating liquors into the United States during the continuance of the war and period of demobilization:

Importation
and transpor-
tation of
liquor

It follows that, while the importing into this country or the bringing into the District of Columbia in interstate commerce of intoxicating liquors is an offense against the laws referred to, no diplomatic representative of any foreign country, received by The President and residing in the District of Columbia, nor any domestic servant of such representative whose name has been duly registered, is subject to arrest for such an offense. Intoxicating liquors belonging to such a diplomatic representative are a part of his goods and chattels, and, as such, are not subject to seizure or detention. This immunity does not extend, however, to persons, other than the representative himself and his registered domestic servant, who may be found transporting liquors from any point within the United States into the District of Columbia, although such liquors may be the property of a foreign diplomatic representative and are being transported for delivery to him.

It is unlawful to sell intoxicating liquors in the District of Columbia. It would be scarcely claimed that an indictment under this law could be defeated by showing that the sale was made to a diplomatic representative of a foreign country. Likewise, it is unlawful to cause intoxicating liquors to be transported from Baltimore, for instance, to Washington. And I apprehend that one could not successfully defend against an indictment for such transportation by showing that the liquors transported were the goods and chattels of a foreign diplomatic representative.

In accordance with the law as above stated, I answer your questions as follows:

1. A railroad or express company or other carrier is not exempt from the penalty of the Reed Amendment if it transports in interstate commerce a shipment of intoxicating liquors consigned to a diplomatic representative residing in the District of Columbia.
2. A vendor or manufacturer of intoxicating liquors who accepts an order for intoxicating liquors from a diplomatic representative of a foreign country residing in the District of Columbia, and ships the same in interstate commerce into the District of Columbia addressed to such diplomatic representative, is subject to the penalty of the Reed Amendment.
3. Laws prohibiting importation are enforced by criminal prosecutions and by seizure and forfeiture of goods. They cannot be enforced against a diplomatic representative who is immune from arrest and whose goods and chattels are not subject

to seizure. It follows that a shipment of liquors from abroad, addressed to a diplomatic representative in the District of Columbia, cannot be seized or molested, and hence its entry must be permitted. Having thus entered the country, its transportation from the seaport to its destination is an incident of foreign and not interstate commerce, and hence not prohibited.

Attorney General Palmer to Secretary Lansing, May 8, 1919, MS. Department of State, file 811.114 Diplomatic/1.

National
Prohibition
Act of 1919

In a letter addressed to the Secretary of State on December 5, 1919, relating to the National Prohibition Act of October 28, 1919 (41 Stat. 305), the Attorney General said:

... Title II of that act, however, which goes into effect contemporaneously with the Prohibition Amendment, makes it unlawful to transport liquor within the United States without regard to whether the transportation be intrastate, interstate or foreign commerce. I am, therefore, constrained to the view that when that Act becomes effective it will be unlawful for any common carrier to transport from the sea port to Washington any intoxicating liquors intended for beverage purposes, although they be consigned to a diplomatic representative of a foreign country.

Of course, as you suggest, on account of the immunity of diplomatic representatives from arrest and the immunity of their goods and chattels from seizure, such representatives cannot be prevented from transporting to Washington personally, and through their registered servants, such intoxicating liquors as they may bring into the country.

Attorney General Palmer to Secretary Lansing, Dec. 5, 1919, MS. Department of State, file 811.114 Diplomatic/2.

Referring to your oral inquiry regarding the method now to be pursued in the matter of the transportation within the United States of wines and liquors intended for members of the diplomatic corps in Washington, I beg to say that, according to a letter which has been received from the proper authority on the subject, "intoxicating liquors imported by a foreign diplomatic representative may be delivered to him in person or to a designated member of his household, and may then be transported in the personal custody of such foreign diplomatic representative or the designated member of his household, and not otherwise, by any available means of transportation, without molestation or interference. As you are aware, neither the employees of the Treasury Department charged with the enforcement of the prohibition laws nor any other officials of the Government have authority under the law to issue formal permits authorizing the transportation within the United States of intoxicating liquors imported for beverage purposes, by common carrier or otherwise. In these circumstances this Department can conceive of no other way by which foreign diplomatic representatives may transport intoxicating liquors which they import from a port of importa-

tion to the embassy or legation in Washington, and this means is conceded not because the law authorizes such transportation, but because members of the Prohibition Enforcement service are without authority to make arrest under the conditions stated."

It is suggested by the Treasury Department that certificates be issued by the Department of State certifying that

"the person or persons designated by the foreign diplomatic representative to receive such intoxicating liquors on his behalf are registered with the Secretary of State as provided by law and are therefore entitled to diplomatic immunity."

The Acting Secretary of State (Davis) to the Cuban Minister (De Cespedes), July 9, 1920, MS. Department of State, file 701.09/205b.

The Acting Attorney General wrote to the Secretary of the Treasury on Aug. 30, 1920 saying:

"... The effect of the law is simply that the Government cannot enforce, as against them [diplomatic representatives], its criminal laws in the ordinary way by arresting them or prosecuting them in the courts or seizing and detaining their goods and chattels. Offenses against our laws may justify a diplomatic complaint to their Governments but not a prosecution in our courts. The result is that persons entitled to diplomatic privileges (and this includes the duly registered servant of a diplomatic representative and members of his household) cannot lawfully be arrested or have liquors belonging to them seized or detained. . . .

"The importation of liquors by diplomatic representatives or the withdrawal from bond of liquors belonging to them can not be prevented. This is true not because the act is lawful but because it can be prevented only by seizing or detaining the liquors and this is unlawful. The transportation of liquors in the personal possession of persons entitled to diplomatic privileges cannot be interfered with for the same reason and also because the person transporting them is not subject to arrest. But neither a public nor a private carrier, nor a messenger (unless a registered servant or member of the household) can receive for transportation and transport such liquors without becoming subject to prosecution.

"I answer your questions as follows:

"1. Both the first section of the 18th Amendment, and the provisions of the National Prohibition Act giving it effect, prohibit absolutely the importation and transportation of intoxicating liquors for beverage purposes and make no exception to these inhibitions in favor of diplomats. I am therefore of opinion that the importation and transportation of intoxicating liquors by persons entitled to diplomatic privileges, in any way, would be in violation of the provisions of the National Prohibition Act, but such persons are not subject to arrest and their liquors cannot lawfully be seized or detained.

"2. The National Prohibition Act provides for the withdrawal from bonded warehouses of intoxicating liquor for non-beverage purposes and for the issuance of permits for such withdrawal. Again there are no exceptions in favor of diplomats and I am constrained to the opinion that withdrawal for beverage purposes even by persons entitled to diplomatic privileges, in any way, would be in violation of the provisions of the National Prohibition Act, but liquor in bond belonging to such persons cannot lawfully be detained from them and hence can be withdrawn.

"3. My answer to the first question applies equally to the third, and I am of opinion the transportation into the United States, in any way, by a diplomat, of intoxicating liquor for beverage purposes would be in violation of the provisions of the National Prohibition Act.

"4. Since persons entitled to diplomatic privileges are not subject to arrest or prosecution in the courts, it is not necessary to report violations of the prohibition laws by them to the United States District Attorney. If the State Department desires to take cognizance of such offenses, they should be reported to that department. Otherwise it is not the duty of the Commissioner to take notice of them.

"5. My answers to the foregoing questions make it clear that for the Commissioner of Internal Revenue to issue permits to any such persons for the purpose of importing and transporting or withdrawing from bond intoxicating liquor for beverage purposes would in effect be permitting a violation of the law. Of course, the Commissioner has no authority to authorize any act in contravention of the law and the issuance of such a permit would clearly be a breach of his legal duty under the National Prohibition Law. He should, however, instruct his agents not to arrest persons entitled to diplomatic privileges or to seize and detain liquors belonging to them."

The Acting Attorney General (Frierson) to the Secretary of the Treasury (Houston), Aug. 30, 1920 (enclosure in letter from the Assistant Secretary of the Treasury (Shouse) to the Secretary of State (Colby), Sept. 3, 1920), MS. Department of State, file 701.09/215.

In the Treasury regulations relating to liquor on vessels, approved on June 2, 1923, it was provided that no seizure should be made of liquor in the possession of:

(a) Diplomatic officers duly accredited by a foreign Government to the Government of the United States.

(b) Diplomatic officers of a foreign Government duly accredited to another foreign Government and temporarily within the United States or its possessions.

(c) Persons attached to or employed by any diplomatic mission whose names have been registered with the Department of State in accordance with the provisions of section 4065 of the Revised Statutes of the United States.

Treasury decision 3484. To the same effect, see section 1730 of Treasury regulations 60 relating to intoxicating liquor (rev. Mar. 1924), Treasury decision 3583.

The Japanese *Chargé d'Affaires ad interim* wrote to the Department of State in 1924 requesting that the necessary steps be taken to arrange for the free passage through the United States of a case containing Japanese sake expected to arrive at San Francisco and intended for the personal use of the Japanese Minister at Mexico City. The Department replied that the laws of the United States did not authorize the passage of intoxicating liquor for beverage use across American territory and that, although the authorities of this Government had not interfered with shipments of intoxicating liquor for beverage use when they were in the possession of a diplomatic officer or of a person entitled to diplomatic immunity, they did not consider the transportation of a shipment such as he mentioned to

be in accordance with the laws. The Under Secretary of State (Grew) to the Japanese Chargé d'Affaires ad interim (Yoshida), Dec. 12, 1924, MS. Department of State, file 811.114 Diplomatic (94).

After referring to the regulations of the Treasury Department providing that no seizure should be made of liquor in the possession of diplomatic officers of foreign countries and persons attached to or employed by diplomatic missions, the Department of State in 1924 wrote:

Obviously, the foregoing regulations are not intended to permit any abuse of the diplomatic privilege, howsoever occasioned. It should be observed, however, that while the statutory law of the United States appears to conform with the requirement of international law forbidding the prosecution of any person entitled to diplomatic immunity on account of the alleged commission of an offense against the laws of the United States, it is not to be presumed that there is any general disposition on the part of the diplomatic officers accredited to this Government or those in their employ who are entitled to exemption from jurisdiction, to commit acts which the laws of the United States forbid. If there were found to be a failure on the part of such an individual to observe properly the spirit of the laws of the United States with respect to sale or transportation of intoxicating liquors, there are doubtless available methods of causing the abatement of such conduct, the application of which would fall within the sphere of executive action at the discretion of the President.

Abuse of
privilege

Secretary Hughes to Senator Fletcher, Apr. 16, 1924, MS. Department of State, file 811.114 Diplomatic/50.

The Consul General in Paris was instructed by the Department of State on February 6, 1925 that, in compliance with a general consular instruction of September 13, 1922 saying that invoices covering shipments of liquor for beverage purposes should not be certified by American consular officers, such officers should decline to issue consular invoices covering shipments of intoxicating liquors intended for beverage use by foreign diplomatic officers stationed in the United States.

Consular
invoices

Secretary Hughes to Consul General Skinner, Feb. 6, 1925, MS. Department of State, file 811.114 Diplomatic/70.

The authorities in Hong Kong listed the American trade commissioner and the assistant trade commissioner there as jurors for the year 1932. The Department of State approved the informal request for exemption on the ground that jury service would seriously interfere with their official duties, stating that it was not aware of any instance in which commercial representatives of foreign governments had been requested to perform jury service in the United States.

Jury
service

The Acting Secretary of State (Castle) to the Consul at Hong Kong, telegram of Apr. 5, 1932, MS. Department of State, file 846G.041/1.

**Military
service**

The Department of State protested when Mar Elia, an employee of the American Legation in Persia who was born in Persia of a Persian father naturalized in the United States prior to the son's birth, was called for Persian military service in 1931.

Secretary Stimson to the Legation at Teheran, telegram 41, Nov. 13, 1931, MS. Department of State, file 124.913/97.

The Department of State, on May 18, 1915, informed the Consul at Genoa that it was considered impracticable to make representations asking that Italian clerks in the American consular service in Italy be exempted from military service. It took similar action in 1935 regarding employees in the Embassy at Rome.

Secretary Bryan to the Consul at Genoa, telegram 18, May 18, 1915, MS. Department of State, file 125.0065/43; Secretary Hull to the Embassy at Rome, telegram 157, Oct. 5, 1935, *ibid.* 124.653/371. See also For. Ser. Reg. U.S. III-1, n. 2, Jan. 1941.

**Hunting
permits**

Hunting in the several States in the United States is a matter within the jurisdiction of the States, and the right to hunt without a permit does not appear to be included among the immunities to which diplomatic officers are entitled.

Secretary Hughes to the Italian Ambassador (Cactani), Dec. 24, 1924 and Jan. 23, 1925, MS. Department of State, file 701.6511/485, /487.

**U. S.
employees'
compensation**

The act of Congress approved May 17, 1928, entitled "An Act To provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes", was held not to apply to embassies and legations.

The Acting Chairman of the United States Employees' Compensation Commission (Bassett) to the Secretary of State (Stimson), May 27, 1932, MS. Department of State, file 701.0011/159.

As to the application of the labor laws of foreign governments to American diplomatic and consular employees, see *post*, ch. XV, §434.

**Violation
of local
law**

The chairman of the board of the New York, New Haven, and Hartford Railroad Company inquired of the Department of State regarding the policy that should be pursued by the company in cases involving disorderly conduct on the part of foreign diplomatic officers, in view of the protection which as a common carrier it was bound to give to its "passengers from persons who are physically or mentally incapacitated". The Department replied:

The general nature of the immunities enjoyed by foreign diplomatic officers accredited to the Government of the United States is stated in Sections 4062-4064 of the Revised Statutes of the United States. Section 4062 states that whoever "assaults, strikes, wounds, imprisons, or in any other manner offers violence to the person of a public minister, in violation of the law of nations, shall be imprisoned for not more than three years, and fined, at the discretion of the court." Section 4063 declares to be void any writ or process whereby the person of any public minister or "any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached". Section 4064 declares that whenever any writ or process is sued out in violation of the preceding section, every person by whom the same is obtained or prosecuted and every officer concerned in its execution "shall be deemed a violator of the law of nations, . . . and shall be imprisoned for not more than three years, and fined at the discretion of the court."

This does not mean that a foreign diplomatic officer is relieved of the restraints of the laws and exempt from the duty of observing them but rather that he cannot be punished by the ordinary processes. The remedy in those cases in which a diplomatic officer abuses his diplomatic privilege is through his recall by his Government, at its own instance, or on the request of this Government.

The question as to the nature and extent of the restraining measures that may be taken by those charged with the duty of maintaining law and order must, of course, depend upon the circumstances of the particular case concerning which no definite rule can be laid down in advance. Certainly such measures should not exceed those absolutely essential to the prevention of obviously illegal acts in disregard of the health and safety of the public.

Having in mind the privileges to which such officials are entitled under our law and the law of nations, you will readily appreciate that situations are rare in which resort to preventive measures would be warranted. The normal and logical procedure would be to report to this Department instances of the abuse of diplomatic privileges in order that they may be handled through the normal diplomatic processes.

The Acting Secretary of State (Welles) to E. G. Buckland, Aug. 7, 1939, MS. Department of State, file 701.3711/707.

The Secretary of State wrote to the Polish Minister in 1924 expressing his regret that the domicile of the Secretary of the Polish Legation had been entered by special agents of the Bureau of Internal Revenue and members of the Metropolitan Police Force of the District of Columbia. He enclosed a letter from the Assistant Secretary of the Treasury expressing the regret of the Treasury Department at the incident and saying that at the time of the entry the officers did not know that the premises were occupied or leased by a member of the

Polish Legation. The Secretary of State added that the Secretary of the Legation had had in his possession a quantity of alcoholic beverages greatly in excess of that which the privileges and immunities enjoyed by the diplomatic representatives residing in the United States would justify and that it was a matter of concern that this diplomatic immunity had been abused. He said that he understood from information furnished by the Minister that the Secretary of Legation had been transferred to Warsaw.

Secretary Hughes to Minister Wróblewski, Jan. 25, 1924, MS. Department of State, file 811.114 Diplomatic /42 %.

A diplomatic representative or consular officer shall not avail himself of the protection afforded by reason of his official position to evade the settlement of just obligations.

For. Ser. Reg. U.S. III-3, Jan. 1941; Ex. Or. 8181, June 22, 1939.

OFFICIAL COMMUNICATION

DEPARTMENT OF STATE AS OFFICIAL CHANNEL

§413

On December 11, 1908 the Department of State wrote to the Norwegian Minister as follows:

It may be stated generally . . . that it is expected that all correspondence and inquiries in respect to matters of business between the foreign governments and the Government of the United States, where such correspondence or inquiries involve comment or a discussion of the subject matter, shall be conducted through the diplomatic channel, which in the United States is the Department of State. Exceptions to this are found in the cases of inquiries by military and naval attaches who are privileged to communicate directly with the War and Navy Departments, respectively, and in the case of postal conventions which the Postmaster General is empowered by law to negotiate directly.

This practice does not, however, apply to merely oral inquiries not affecting matter receiving or requiring treatment through the diplomatic channel. It is quite appropriate for instance, to send directly to another Department for copies of printed circulars or other publications which are accessible to all applicants. But even in matters of this sort it is preferred that the Department of State should be the medium through which the requests are communicated to other Departments of this Government.

Acting Secretary Bacon to Minister Gude, no. 96, Dec. 11, 1908, MS. Department of State, file 16846.

A similar communication was sent to the chiefs of mission in Washington in Nov. 1915, the contents of which were also communicated to the heads of the executive departments of the Government of the United States.

Memorandum from Secretary Lansing to the chiefs of mission at Washington, Nov. 15, 1915, *ibid.* 701.04/orig.; Mr. Lansing to the Postmaster General, etc., Nov. 18, 1915, *ibid.* /1a.

On Mar. 21, 1918 the Secretary of State informed the departments of the United States Government, Government boards, and other administrative bodies that the embarrassment involved in the addressing by foreign diplomatic officers in the United States of correspondence and inquiries directly to the head or some other individual officer of one of the executive departments of the United States could be overcome by centralizing the intercourse with foreign diplomats in the State Department, where with a few exceptions it belonged by law and custom. He stated that he did not desire "to restrict intercourse between members of non-diplomatic technical, scientific or other similar special missions in this country, or of joint commissions of the United States and other countries, and other departments or officials of the Government upon matters having no bearing upon political or politico-commercial relations of the United States with foreign countries". He requested that "where it is necessary for members of foreign missions to confer informally with your Department on matters involving the political or politico-commercial relations of the United States you will be good enough to inform me thereof, and to have the formal communications between your Department and foreign diplomatic officers on such subjects pass through the Department of State". The Secretary of State (Lansing) to the Secretary of the Navy, Mar. 21, 1918, MS. Department of State, file 701.04/12a. See also the Second Assistant Secretary of State (Adee) to the War Trade Board, Apr. 8, 1918, *ibid.* /17a; Mr. Adee to the Alien Property Custodian, May 15, 1920, *ibid.* /26.

A member of Congress inquired of the Department of State in 1925 concerning its rules with reference to correspondence between members of Congress and diplomatic representatives of foreign governments in Washington. The Department replied that "In cases concerning matters of a strictly official character it would of course seem preferable that the correspondence be carried on through the Department of State". Secretary Kellogg to Representative La Guardia, June 16, 1925, MS. Department of State, file 091/66.

Having been informed that a United States attorney had addressed the Salvadoran Minister with a view to having him appear before a grand jury to testify in respect to the breaking into his Legation and an assault upon him, the Department of State wrote to the attorney pointing out that it was "a well established practice that when officers of a branch of the Government other than that charged with the conduct of foreign relations, desire to communicate with members of the diplomatic corps, their communications should be sent to the Department of State in order to make certain that no conflict with its policies is involved and to avoid any feeling on the part of these foreign diplomatic officers that they have not been shown the consideration they are entitled to as the representatives of their governments". The Assistant Secretary of State (White) to Leo A. Rover, Feb. 9, 1932, MS. Department of State, file 701.1611/237A.

... the Secretary of State is the recognized authority, under the direction of the President, for conducting the foreign relations of the United States. Accordingly, the Department has consistently held the view that no officer, civil, military or naval,

can properly carry on an official correspondence with a foreign government except through the Department of State.

The Acting Secretary of State (Welles) to Representative Andrews, Mar. 10, 1939, MS. Department of State, file 867N.01/1465.

Exceptions

In 1919 the British Chargé d'Affaires informed the Department of State that it had been suggested that an arrangement be made whereby the United States and Canadian Departments of Justice and their respective agents should communicate direct with one another without being obliged to have recourse to the good offices of the Embassy and the Department of State. The Department replied that the Attorney General had been informed that it had no objection to the proposed procedure provided that the Department of Justice informed the Department of State concerning the matters taken up in this manner.

Secretary Lansing to Chargé Lindsay, Oct. 15, 1919, MS. Department of State, file 701.04/21.

The Director of the Veterans' Bureau was informed by the Department of State that it perceived no objection to direct correspondence between the foreign missions in Washington and the Veterans' Bureau in connection with cases of a routine nature arising under the World War Veterans' Act, but that it should be understood that all matters other than those of a routine character involving questions of policy or principle were to be transmitted in the usual manner to the Department. The Under Secretary of State (Grew) to the Director of the Veterans' Bureau, Dec. 12, 1924, MS. Department of State, file 701.04/40.

On February 19, 1931, the Secretary of State wrote to the Secretary of Labor that for the assistance of his Department, which was charged with the conduct of foreign relations, it would be desirable to revert to the general practice of having all communications with representatives of foreign governments conducted through its intermediary, although there appeared to be no objection to continuing the practice of direct communication with certain missions in the United States regarding passport facilities wherein specific permission had previously been given by the Department of State. Later, on April 11, 1931, he stated that there also seemed to be no objection to the practice of the Department of Labor in informing the embassies and legations of foreign countries in advance and upon their request with regard to the deportation of their nationals. The Secretary said:

With regard to the direct communication with such foreign representatives in immigration cases concerning their nationals, other than those referred to above, it would seem that the direct communication should be restricted to the cases in which such representatives may desire to appear or present statements during

formal hearings, on behalf of their nationals. Where the foreign representatives desire to appear or present statements against the national or to make a complaint in regard to the action of an American official it would seem that such representative might be referred to the Department of State or if a communication has been received a copy might be forwarded to this Department with a letter of transmission containing information upon which an appropriate reply might be drafted by this Department.

The Secretary of State (Stimson) to the Secretary of Labor, Feb. 19, and Apr. 11, 1931, MS. Department of State, file 811.111 Kosutic, August.

The German Foreign Office wrote to the American Embassy in Berlin in 1927 in regard to an inquiry addressed by the Commissioner of Immigration at Ellis Island, New York, to the chief of police in a German city concerning the alleged prison record of a native of that city, recommending that in similar cases in the future inquiry be made through the diplomatic channel. The Department of State suggested to the Department of Labor that such correspondence be conducted through the Department of State. The Assistant Secretary of State (Wright) to the Secretary of Labor, Apr. 13, 1927, MS. Department of State, file 092.62/149.

It is "not customary for the President to communicate with the chiefs of state of foreign countries through other than diplomatic channels".

Communication by and to heads of states

The Assistant Secretary of State (Castle) to the Secretary to the President (Richey), Feb. 26, 1931, MS. Department of State, file 810.79611 Prosperity Flight/2. See also *ibid.* 811.79621 Mendez, Benjamin/10.

The Commissioner for the Commonwealth of Australia in the United States in 1925 suggested that the President and the Secretary of State send messages of greeting to Australia when direct communication by radiotelephone should be established between Pittsburgh and Melbourne. The Secretary replied that neither the President nor he could appropriately address peoples as such.

Secretary Hughes to Commissioner Elder, Jan. 23, 1925, MS. Department of State, file 811.7647/-.

A member of the Japanese Diet having addressed two letters to the President of the United States commending certain actions taken by the President and requesting "that he take yet one more resolute step", the Department of State, on August 10, 1932, instructed the Ambassador in Tokyo that he might inform him, should no objection be perceived, that, while the President appreciated the writer's friendly interest, it would be contrary to his practice to communicate with a citizen or a subject of a foreign state in regard to questions of public concern, such matters being appropriately reserved for the consideration of governments through the channel of their diplomatic representatives.

Under Secretary Castle to Ambassador Grew, no. 58, Aug. 10, 1932, MS. Department of State, file 462.00R296/5180.

The Department of State in acknowledging a letter addressed to the Assistant Secretary to the President by the Czechoslovak Minister suggested that, if convenient, communications to the White House be sent through it in order that a uniform procedure might be maintained and for purposes of record.

The Acting Secretary of State (Phillips) to the Minister of Czechoslovakia (Veverka), Feb. 25, 1935, MS. Department of State, file 800.504 Unemployment /137.

States

In 1911 the Secretary of State brought to the attention of the Governor of Oregon the fact that the Acting Governor and Commander in Chief of the Oregon Naval Reserve had addressed a letter to the British Secretary of State for Foreign Affairs in London in regard to a complaint by a captain of the naval forces of the State of Oregon against the British Consul at Portland. The Secretary pointed out that, by the Constitution of the United States, negotiations between this Government and foreign powers are entrusted exclusively to the President of the United States and that these negotiations have been placed by laws of Congress in the hands of the Department of State under the direction of the President. He called attention to the irregularity of the course adopted by the Acting Governor and said that any charges against the British Consul should be presented to the Department which would bring them to the attention of the British Ambassador in Washington.

Secretary Knox to the Governor of Oregon, Feb. 20, 1911, MS. Department of State, file 100.6541/—.

With reference to a letter addressed to the Governor of Alabama by the South African Trades and Labour Council concerning the Scottsboro case, transmitted by the American Consul General at Johannesburg, the Department stated in an instruction of October 12, 1931:

The Department does not deem it a proper procedure for it to act as a medium of transmission between foreign individuals and organizations and the Governor of a State of the United States, and in returning the letter herewith suggests that Mr. Andrews be advised to post his letter in the usual manner.

Secretary Stimson to Consul General Moorhead, Oct. 12, 1931, MS. Department of State, file 811.4016 Scottsboro/6.

General Carranza in 1915, as First Chief of the Constitutionalist Army, instructed all military commanders of his army that it was his

exclusive province to direct all kinds of diplomatic negotiations. He reminded them that they were not authorized to receive or admit or to pass any decision upon notes involving complaints or representations in behalf of foreigners.

General Carranza to all military commanders of the Constitutionalist Army (enclosure to note from the Confidential Agent of the Constitutional Government of Mexico [Arredondo] to Secretary Bryan, Feb. 15, 1915), MS. Department of State, file 812.00/14397; 1915 For. Rel. 632.

Mr. Silliman, the American Special Agent near General Carranza in Mexico in 1915, was told several times when he brought certain matters to the attention of the *de facto* government under instructions from the Department of State that the questions should be taken up with the Governors of the States in which they occurred. The Department of State in November 1915 instructed Mr. Belt, then Special Agent near General Carranza, that it considered diplomatic representations to officials of the political subdivisions, such as states or provinces, to be regular only in exceptional cases and that it was the obligation of the *de facto* government of Mexico, in keeping with established usage, to entertain and act upon representations made to it by the Department of State concerning matters occurring in the several States of the Mexican Republic.

Secretary Lansing to John Belt, telegram of Nov. 11, 1915, MS. Department of State, file 611.129/47; 1915 For. Rel. 776.

On May 13, 1915 the Secretary of State instructed the American Ambassador to Germany to present a note to the German Minister of Foreign Affairs referring, *inter alia*, to a newspaper report of a formal warning, purporting to come from the Imperial German Embassy in Washington, addressed to the people of the United States, to the effect that any American citizen exercising his right of free travel on the seas would do so at his peril if he journeyed within certain zones. The Secretary characterized this method of communication as a "surprising irregularity".

Secretary Bryan to Ambassador Gerard, telegram 1664, May 13, 1915, MS. Department of State, file 763.72/1764a; 1915 For. Rel. Supp. 393, 395.

In a communication to the Secretary of State of May 1, 1915 the Counselor for the Department of State said that this use of the American press seemed to him "highly improper" and that such communications should be sent to the Department, which could make the contents public if it pleased, but that not to address the Department at all was "an impertinent act". Counselor Lansing to Secretary Bryan, May 1, 1915, MS. Department of State, file 462.11T41/23½; I *The Lansing Papers, 1914-1920* (For. Rel.: 1940) 381, 382.

Section 5 of title 18 of the United States Code penalizes every "citizen of the United States, whether actually resident or abiding within

Logan act:
18 U.S.C. §5

the same, or in any place subject to the jurisdiction thereof, or in any foreign country, who, without the permission or authority of the Government, directly or indirectly, commences or carries on any verbal or written correspondence or intercourse with any foreign government or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the Government of the United States; and every person, being a citizen of or resident within the United States or in any place subject to the jurisdiction thereof, and not duly authorized, who counsels, advises, or assists in any such correspondence with such intent". It is stated, however, that nothing in this section "shall be construed to abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects".

35 Stat. 1088; 47 Stat. 132.

Departmental Order 601 of the Department of State of Oct. 17, 1934 provides that American citizens requesting to be permitted to counsel, advise or assist foreign governments, officers, or agents thereof in matters coming before the Department shall be required to make full disclosure under oath of the circumstances of their employment.

Eldon R. James, an American citizen, informed the Department of State in 1925 that for the preceding five years he had been the Siamese representative on the Permanent Court of Arbitration at The Hague and that in view of this service and his service as Adviser in Foreign Affairs to the Siamese Government the King of Siam had recently conferred on him the rank of Minister Plenipotentiary. He inquired whether it would be necessary for him to obtain the consent of the Government of the United States before accepting the appointment. The Department in reply referred to section 5, title 18, of the United States Code and said:

As long as your activities under your new appointment are not intended to influence the measures or conduct of the Siamese "Government or of any officer or agent thereof in relation to any disputes or controversies with the United States, or to defeat the measures of the Government of the United States", it would not seem to be necessary for you to write a formal letter to the Secretary of State.

If, on the other hand, it is your intention to advise the Siamese Government with respect to any disputes or controversies which might be pending between that Government and the United States, it would be preferable for you to address an official letter to the Secretary of State, requesting the permission of this Government so to do.

The Under Secretary of State (Grew) to E. R. James, June 23, 1925, MS.
Department of State, file 892.01A/86.

Section 1, of title VIII, of the act approved June 15, 1917 penalizes whoever "in relation to any dispute or controversy between a foreign government and the United States, shall willfully and knowingly make any untrue statement, either orally or in writing, under oath before any person authorized and empowered to administer oaths, which the affiant has knowledge or reason to believe will, or may be used to influence the measures or conduct of any foreign government, or of any officer or agent of any foreign government, to the injury of the United States, or with a view or intent to influence any measure of or action by the Government of the United States, or any branch thereof, to the injury of the United States".

40 Stat. 217, 226; 22 U.S.C. §231.

Section 2 of the same title penalizes:

Whoever within the jurisdiction of the United States shall falsely assume or pretend to be a diplomatic or consular, or other official of a foreign government duly accredited as such to the Government of the United States with intent to defraud such foreign government or any person, and shall take upon himself to act as such, or in such pretended character shall demand or obtain, or attempt to obtain from any person or from said foreign government, or from any officer thereof, any money, paper, document, or other thing of value.

40 Stat. 217, 226; 22 U.S.C. §232.

DIPLOMATIC CORRESPONDENCE

§414

Chapter XII, section 1, of the Foreign Service Regulations of the United States provides (Jan. 1941):

The diplomatic representative shall conduct all direct correspondence with the government of the country to which he is accredited.

Ex. Or. 8077, Apr. 4, 1939.

In 1919 the Department of State suggested to the commercial representatives for the Government of Iceland in the United States that, in view of its understanding that, under the law of November 30, 1918, the foreign affairs of Iceland would be cared for by Denmark, all further communications to it on behalf of the Icelandic Government should be addressed through the Danish Minister in Washington.

The Assistant Secretary of State (Phillips) to the commercial representatives for the Government of Iceland, Jan. 16, 1919, MS. Department of State, file 859A.01/6.

The Chinese Minister of Finance in 1934 requested the American Consul General at Shanghai to forward to the President of the United States a message making certain inquiries regarding the probable policy of the United States in the future purchase of silver. The Department of State pointed out that the communication should have been sent through the Ministry of Foreign Affairs. The Consul General was instructed that if he were again requested by Chinese officials to render a similar service, he should, unless he saw a substantial reason to the contrary, inform such officials that they should use the usual diplomatic channels.

Secretary Hull to the Consul General at Shanghai, telegram 227, Sept. 22, 1934, MS. Department of State, file 811.515 Silver/21. To the same effect, see Mr. Hull to the Embassy at Nanking, telegram 179, Aug. 25, 1937, *ibid.* 793.94/9634.

The correspondence of two independent governments is customarily conducted between their respective governmental departments, charged by law with the conduct of foreign relations, and the accredited representatives which each of those governments may maintain in the territory of the other. If the Executive Secretary of the Panama Canal were authorized to communicate directly with the officials of the Panaman Government on matters pertaining to the operation of the Canal, it should, nevertheless, be observed that the latter Government is merely acting in accordance with the established practice of international intercourse in addressing correspondence concerning the interests of the United States to the American Legation at Panama.

The Under Secretary of State (Grew) to the Minister to Panama (South), no. 238, Oct. 22, 1924, MS. Department of State, file 100.6519/-.

Communica-
tions from
aliens

On April 18, 1921 the Department of State issued circular instructions to diplomatic and consular officers to the effect that it was desired that, in conformity with diplomatic practice, all memorials, messages, resolutions, and communications which private citizens or subjects of foreign countries wished to have sent to the President or the Secretary of State should be tendered through the diplomatic representative of the sender's country in Washington.

The Under Secretary of State (Fletcher) to the diplomatic and consular officers, Apr. 18, 1921, diplomatic serial 31, MS. Department of State, file 091/37a.

The American Embassy in London forwarded to the Department of State in 1924 a claim against the Government of the United States. The Depart-

ment informed the Ambassador that it was not clear on whose behalf the claim was presented but that if the claimant was a British subject the Embassy should not have forwarded the claim but should have suggested that it be taken up through his Government. Under Secretary Phillips to Ambassador Kellogg, no. 26, Jan. 26, 1924, MS. Department of State, file 411.41C41/-.

The Society of Colonial Daughters of the Seventeenth Century inquired of the Department of State in 1908 how they might convey a message of salutation to the Queen of the Netherlands. The Department replied that—

communications by foreigners to sovereigns are required to be presented through the sovereign's diplomatic agent at the capital of the country of which the signers are citizens. Your proposed message to Queen Wilhelmina should, therefore, be sent through the Legation of the Netherlands at Washington directly, and not through this Department.

The Acting Secretary of State (Bacon) to Mrs. William Leslie van Sinderon, May 7, 1908, MS. Department of State, file 13491.

It is only in rare instances that the Department permits the transmission of private literature to foreign potentates through American missions.

Gifts to
foreign
potentates

The Acting Secretary of State (Bacon) to the Minister to Greece (Pearson), July 23, 1908, MS. Department of State, file 14701.

. . . Formal communications addressed to the government to which an officer is accredited shall be in the English language. When desirable, the English text may be accompanied by a translation in the language of the country, which must be specifically designated "unofficial translation".

Language

For. Ser. Reg. U.S. XII-1, n. 1 (a), Jan. 1941.

The Minister to Rumania was instructed by the Department of State in 1910 that his Legation might continue to correspond in French with the various Foreign Offices, this being the recognized language of communication between the Foreign Offices in Rumania, Serbia, and Bulgaria. The Department said:

As it would appear that the business of the Legation would be retarded by an attempt to conduct its correspondence in English and that expenses would necessarily be incurred in the employment of translators should the several Ministers for Foreign Affairs reply to your notes in their native languages, the Department approves the suggestion that the Legation should continue to correspond in French with the various Foreign Offices.

Assistant Secretary Wilson to Minister Carter, no. 25, Apr. 6, 1910, MS.
Department of State, file 3381/75. Mr. Carter was also accredited to Serbia
and Bulgaria.

**Official
etiquette**

In September 1914 a Washington newspaper published an interview with the Turkish Ambassador to the United States in which the latter attacked the press of the United States for its attitude toward Turkey, calling attention to the lynchings in the United States and the water cure in the Philippines. The Ambassador acknowledged that he was the author of the statements and made certain explanations in extenuation of his act. He said:

I may have transgressed diplomatic rules but the occasion was one in which I firmly believe that it was not only pardonable but legitimate to depart from conventionalities. The interests of humanity cannot be sacrificed to form.

The Secretary of State replied:

The President directs me to inform Your Excellency that your note is not acceptable in tone, nor is it a satisfactory explanation of your conduct, and that it is regrettable that you permitted yourself to become so irritated over the utterances of a very inconsiderable portion of the press of the United States as to commit so serious a breach of official etiquette as that which you admit and attempt to defend.

The President desires me to state further that, recognizing the tension caused by the acute situation in Europe, he is not disposed to deal as strictly with an offense against the hospitality of the United States, which you as the diplomatic representative of your Government enjoy, as he would, under normal conditions, consider necessary and consistent with the dignity of the United States.

I am, therefore, instructed to inform Your Excellency that, if you feel that your services at this capital can still be useful to your Government, and if you are willing to express your regret for your published utterances, which this Government considers to be offensive, the President is disposed to pass over without further comment your public statement and your note and renew the cordial and friendly intercourse between Your Excellency and the Government of the United States, which existed before this unfortunate incident occurred.

The Ambassador replied that he regretted that he was not able to accept the President's point of view and that, consequently, he had asked his Government to grant him leave of absence. When he sailed from New York it was reported in the newspapers that he had announced his intention of returning to Washington later. The Ambassador in Constantinople was instructed to intimate to the Turkish Government that he was *persona non grata* and that he could not be

received by the President as Turkish Ambassador if he should return to the United States.

Ambassador Rustem Bey to Secretary Bryan, Sept. 12, 1914, and the Acting Secretary of State (Lansing) to Rustem Bey, Sept. 19, 1914, MS. Department of State, file 701.6711/88; Rustem Bey to Mr. Lansing, Sept. 20, 1914, *ibid.* /94; Mr. Lansing to the Ambassador in Turkey, telegram of Oct. 8, 1914, *ibid.* /97a; I *The Lansing Papers, 1914-1920* (For. Rel.: 1940) 68, 69, 73-74.

The Minister in Lisbon reported to the Department of State in 1927 that a suggestion had been made by some members of the Diplomatic Corps there regarding the obligation on the part of the Portuguese Government to provide liaison and means for telegraphing to the outside world in case of future troubles in Portugal. The Department instructed the Minister:

Right of
communi-
cation

The Department has no objection to you or the diplomatic corps reminding the Portuguese Government of the importance of taking all possible steps to maintain liaison between the Government and the diplomatic corps and to keeping open the channels of communication with the outside world during times of civil stress such as the recent outbreak. However, the Department does not believe that it could appropriately hold the Portuguese Government strictly responsible on this score during periods of revolution or rebellion, provided that the Government takes reasonable measures to insure such liaison and communication. At such times a certain amount of improvisation is almost inevitably necessary and, in this connection, it is suggested that you discuss matters informally with the British Embassy with a view to effecting an arrangement with it whereby in case normal communications are cut off by such disturbances as may arise in the future the Legation may have an alternative channel for its communications to the Department.

Under Secretary Grew to Minister Dearing, no. 811, Mar. 21, 1927, MS. Department of State, file 853.00/758.

When the President of the United States, in November 1916, indicated that Count Tarnowski would be acceptable to him as the Austro-Hungarian Ambassador in the United States, the Ministry of Foreign Affairs of that country indicated to the American Ambassador in Vienna that it assumed that by giving this *agrément* the President would assure Count Tarnowski the means of communicating with his Government in the same measure as the American Ambassador was enabled to communicate with the Department of State. He referred to the adoption by the Government of the United States of full control over wireless-telegraph stations. The Department of State informed the American Ambassador that all it wished to accomplish by such

control was to prevent the use of its territory as a base of naval operations and that it felt sure that the Austro-Hungarian Ministry of Foreign Affairs would appreciate the inability of the Government of the United States to modify a traditional principle of neutrality. On November 22, 1916 the Ministry of Foreign Affairs wrote to the American Ambassador that it accepted the verbal proposal of the Government of the United States according to which the Austro-Hungarian Ambassador would be in radiotelegraphic communication with his Government by means of a cipher code deposited with the Department of State in Washington.

Ambassador Penfield to Secretary Lansing, telegram 1524, Nov. 11, 1916, and Mr. Lansing to Mr. Penfield, telegram 1417, Nov. 14, 1916, MS. Department of State, file 701.6311/228; Baron Macchio to Mr. Penfield, Nov. 22, 1916 (enclosure to despatch 2230 from the Embassy in Vienna, Nov. 24, 1916), *ibid.* /255; 1916 For. Rel. Supp. 801, 803, 806.

In 1931 the Yugoslav authorities withheld from the agricultural attaché of the American Legation in Belgrade the privilege of making use of the cipher in telegraphic correspondence. The Ministry for Foreign Affairs stated that this policy was based on the principle that the right to employ a cipher code belonged exclusively to the chief of mission and that no objection would be made to the dispatch of ciphered messages by the various attachés of the Legation provided they bore the typewritten name of the chief of mission and an impression of the Legation's seal. The Department of State instructed the Minister as follows:

Inasmuch as the diplomatic status of Agricultural, Commercial and other attachés is derived from the fact that these individuals are members of the Legation's staff, the Department is of the opinion, upon the basis of the information presented to it, that objection cannot consistently be made to the Yugoslav requirement that messages sent by such attachés should bear the name of the Chief of Mission and the Legation's seal. As the Chief of Mission is responsible for the acts of the subordinate members of his staff, and as this responsibility makes it highly desirable that he be kept informed with respect to telegraphic messages sent by the various attachés, it is not believed that the foregoing requirement should prove unduly burdensome.

It seems essential however that there should be no impairment of the right of the various attachés to send cipher messages to the Mission itself, whenever such attachés may be absent from the capital city on official business, but within the country itself. It seems likewise essential that there should be no impairment of the same right on the part of subordinate diplomatic officers. If you have reason to believe that the present policy of the Yugoslav authorities is such as to bring the foregoing rights into question, it is suggested that you make appropriate representations.

with the approval of the International Joint Commission (art. III), to be composed of six commissioners, three to be appointed by each Government (art. VII). It is stipulated that the following order of precedence shall be observed among the various uses of the waters: (1) Domestic and sanitary purposes; (2) navigation; and (3) power and irrigation. However, the then-existing uses of boundary waters were not to be disturbed.

International
Joint Com-
mission

The high contracting parties have, under the terms of the convention, "equal and similar rights in the use of the [boundary] waters". But the requirement for an equal division may, in the discretion of the Commission, be suspended in certain cases of temporary diversions. The Commission may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and it may condition its approval upon suitable and adequate provision being made for the protection and indemnity of all interests on the other side of the line which may be injured. (Art. VIII.)

As indicated *ante* (§86), special provisions are contained in the convention with reference to the Niagara, St. Marys, and Milk Rivers (arts. V and VI).

Other questions or matters of difference arising between the high contracting parties involving the rights, obligations, or interests of either in relation to the other along the common frontier shall, upon request of either the Government of the United States or the Government of Canada, be referred to the International Joint Commission "for examination and report", such reports not to be regarded as decisions of the questions submitted and not to have the character of arbitral awards (art. IX). The Commission may, upon agreement of the parties, also act as an arbitral tribunal in certain classes of cases referred to in article X.

3 Treaties, etc. (Redmond, 1923) 2607-2614. The Senate of the United States conditioned its advice and consent to the convention on the understanding that nothing therein should affect existing rights "at the rapids of the St. Mary's River at Sault Ste. Marie". *Ibid.* 2615. See the opinion of Attorney General Wickersham of Apr. 8, 1909 construing the scope of the reservation. 27 Op. Att. Gen. (1908-9) 295, 298-300.

In 1910 the Canadian Minister of Public Works, speaking before the Canadian House of Commons in support of the convention signed on January 11, 1909, stated:

Canadian
position

I may say that that is simply an affirmation of what has always been contended by the United States to be international law, and of what I do not think has been disputed by the jurists of this country, that is to say that so far as the waters which are wholly situate within the country are concerned, that coun-

try may make a diversion of these waters and prevent them from flowing into the boundary waters.

The United States have contended that it is a principle of international law that any country has the right to divert waters in its own country subject always, I may say, to the question of navigation.

The question might arise between the inhabitants of Montana, Alberta and Saskatchewan, because a person or company in Montana might divert certain waters which flow to the northward and use these waters for the purposes of irrigation. The result might be to deprive a Canadian living lower down the stream upon the Canadian side of the boundary of water which would be very necessary for the purpose of irrigation. Before this treaty that could be done and he could not say a word, but under this treaty he can complain through this government, I take it, to the authorities of the United States, and it would be their duty, in carrying out the spirit of this treaty, to see that compensation is provided for the injury, and, vice versa, the same obligation that is imposed upon the people of the United States is also imposed upon the people of Canada.

Still later he said:

I think my hon. friend will find that the recognition of the international right to complain of the diversion of waters before they pass into its territory depends entirely upon the question of navigation. I am satisfied that if my hon. friend looks up the authorities he will find that that is the only case in which the sovereign right of a country is disputed. It is recognized that it pertains to the sovereign right of a country to deal with waters in its own territory, just as it would deal with any other species of property, and that right, under international law, is subject to this one consideration, that if diversion interferes with the waters in that country, if it interferes or materially affects navigation in the territory further down, the government of the country whose navigation has been affected has a right to complain under the principles of international law against such diversion. I am satisfied my hon. friend will find that the right is limited wholly to cases where it is alleged that navigation has been seriously interfered with.

Debates of the House of Commons of the Dominion of Canada, 11th Parliament, 3d sess. (1910-11), vol. I, pp. 870, 879, 893.

Diversion:
the Chicago
Drainage
Canal

The Chicago Drainage Canal, built by the Sanitary District of Chicago created under an act of May 29, 1889 (Laws of Illinois [1889] 125), was opened in January 1900. It diverts waters of Lake Michigan through the Chicago and the Illinois Rivers to the Mississippi River in the disposal of sewage. On January 17, 1903 the Secretary of War ordered that after March 31 of that year the daily diversion of water from Lake Michigan should not exceed 250,000 cubic feet a minute. In March 1907 and in January 1913 he denied

POUCHES

§415

Article 362 of the Customs Regulations of 1937 provides:

Articles containing merchandise of any character must not be forwarded in diplomatic or other official pouches, as such articles are subject to the customs laws and regulations.

As to limitations on the use of diplomatic pouches, the Department of State in 1939 said:

. . . Under the general principles of international law the use of diplomatic pouches is limited to matter the importation of which is not prohibited and which has the privilege of free entry into the country of destination. Such pouches are not subject to inspection by the authorities of the other government. Each government must rely upon the good faith of the other to assure that the privileges of the pouch are not abused. Under these principles it is not permissible to use diplomatic pouches to import merchandise for private individuals.

Handling of
diplomatic
mail

The Acting Secretary of State (Welles) to the Attorney General, Aug. 4, 1939, MS. Department of State, file 052.51/41.

. . . The pouch is established for the safe carriage of the official correspondence of this Government and on that basis has a recognized status in international law and practice. A foreign government would certainly be within its rights to complain if the pouch were used habitually to carry the correspondence of private American companies or citizens. While this Government recognizes freedom of speech, it is not its function to impose its precepts on other governments of the world, nor is it a proper use of the diplomatic pouch to get out of the country correspondence containing matter which that government under its sovereign authority censors. As a rare exception, to help American companies in a purely business way, such as communicating data regarding bids which they wish to make on government contracts, the government occasionally authorizes the use of its pouches for such private correspondence in appropriate cases, but when this correspondence contains criticism of the foreign government concerned or discussion of its politics or policies, it is not a proper matter for inclusion in the pouch. The political reports of the Embassy to the Department are on an entirely different basis than those of a foreign company to its principals. When the corporation enters a foreign country it subjects itself to the rules and regulations of that country and this Government cannot aid in their evasion.

The Assistant Secretary of State (White) to the Ambassador to Peru (Dearing), no. 500, Mar. 31, 1933, MS. Department of State, file 051.23/82.

The Department of State in 1931 wrote to the First Secretary of the Turkish Embassy in regard to "the manner in which correspondence . . . between the Department of State and American diplomatic missions abroad (and vice-versa) is handled" and "the treatment accorded the mail addressed to and from the missions of foreign Governments in the United States", saying:

Regarding correspondence in the category first above mentioned, it may be stated that interchanges of correspondence between the Department and American embassies and legations outside of Europe are carried on through the medium of the ordinary postal authorities of the countries through which the pouches conveying the mail pass. Correspondence by the Department with most of its European posts is sent by pouch in the mails to the American Embassy at Paris, whence it is conveyed by couriers who operate on three routes across Europe, thus covering most of that continent.

Similarly, pouches containing the postal matter of the American representatives at European capitals are confided to these same couriers, who bring them to Paris on their return journey. The contents are then rearranged and, if destined for points outside of Europe, are forwarded by the ordinary postal channels.

Mail addressed to or from the diplomatic missions of foreign Governments in the United States is usually forwarded to destination, as promptly as possible, by the American postal authorities. Occasionally, however, diplomatic missions in Washington have arranged with the Department of State for delivery of pouches arriving by ocean steamer direct to a courier despatched to an American port for that purpose. Such facilities are accorded only to the representatives of countries which are willing to grant a like privilege to American representatives accredited to their Government, i. e. on condition of reciprocity.

The Chief of the Division of Near Eastern Affairs (Murray) to the First Secretary of the Turkish Embassy (Sabit), Apr. 11, 1931, MS. Department of State, file 701/178.

An attorney at law in 1921 asked the Department of State to transmit two communications to the attorney in Hungary of a resident of the United States who allegedly had a claim against the Yugoslav Government. The Department refused the request on the ground that its regulations prohibited the transmission of private correspondence with the official mail.

The Director of the Consular Service (Carr) to L. A. Zavitsky, Feb. 19, 1921, MS. Department of State, file 660h.11245/4.

COURIERS

§416

In respect to the immunities accorded bearers of despatches, the Foreign Service Regulations provide:

. . . Couriers and bearers of despatches employed by a diplomatic representative in the service of his government are privileged persons, so far as is necessary for their particular service, whether in the state to which the representative is accredited or in the territory of a third state with which the government is at peace.

For. Ser. Reg. U.S. III-1, n. 5, Jan. 1941.

On July 13, 1917 the Department of State informed the heads of diplomatic missions at Washington that thereafter the Government of the United States would recognize as diplomatic couriers of foreign governments only persons regularly employed in the courier service of the foreign government concerned or their diplomatic and consular officers of career and that in all cases the right of search of the personal baggage and effects of couriers was reserved, except in the case of diplomatic officers.

Memorandum from the Department of State to the heads of diplomatic missions at Washington, July 13, 1917, MS. Department of State, file 701.01/4a.

In 1918 the Danish Minister expressed to the Department of State the desire of his Government to have Mr. Thorkil Lohse admitted to the United States in the capacity of courier and permitted to leave for Buenos Aires in the same capacity. The Minister was informed that in that instance the Government of the United States would make an exception to its regulations respecting bearers of official despatches and would issue instructions to the competent authorities to pass Mr. Lohse's despatches without examination, on the understanding that his Government was prepared to treat American couriers in a similar manner. The Minister was informed that no visa or special certificate would be necessary in order to exempt from examination the official despatches in question but that Mr. Lohse should be informed that his personal baggage would not be so exempted. Secretary Lansing to Minister Brun, no. 89, Feb. 19, 1918, MS. Department of State, file 701.01/11b.

The Legation at Stockholm was instructed by the Department of State on July 28, 1918 that, at the request of the Swedish Minister at Washington, it was authorized to recognize one Mr. Lindman as a courier of the Swedish Government from Stockholm to Washington, it being understood that his bags under official seal would be regarded as inviolate and his landing facilitated but that it would not be possible to grant him diplomatic privileges. The Acting Secretary of State (Polk) to the Legation at Stockholm, telegram 976, July 28, 1918, MS. Department of State, file 701.01/17a.

In instructing the Ambassador in Austria-Hungary, on September 8, 1915, to present a note to the Foreign Office announcing that Ambassa-

dor Dumba was no longer acceptable as Austro-Hungarian Ambassador at Washington, the Secretary of State directed the Ambassador to point out the "flagrant violation of diplomatic propriety" of which Mr. Dumba had been guilty in employing an American citizen protected by an American passport as a secret bearer of official despatches through the lines of the enemy of Austria-Hungary.

Secretary Lansing to Ambassador Penfield, telegram 887, Sept. 8, 1915, MS. Department of State, file 701.6311/145a; 1915 For. Rel. Supp. 933, 934. See also *ante* §385.

Customs

As regards customs immunity of diplomatic couriers it appears that diplomatic couriers are not mentioned in Article 425 (a) (1) of the Customs Regulations of 1931 and that they are therefore not entitled to the privilege of having their baggage and effects passed without customs examination in the absence of specific authorization. According to a ruling of the Treasury Department, however, that Department has signified its willingness to instruct the Collector of Customs at the appropriate port of entry to admit free of duty the baggage and effects of diplomatic couriers upon request from the Department of State *in each instance*. The making of such a request by this Department would, of course, be conditioned on the assurance that reciprocal courtesies would be extended.

The Secretary of State to the Ambassador of Turkey, Aug. 24, 1937, MS. Department of State, file 811.111 Diplomatic/10667.

... they [diplomatic couriers] receive free entry, without examination, for their official papers and documents, and expeditious passage through the customs for themselves and their effects.

In other words, the exemptions accorded him are for the documents he carries rather than for himself. Once he has finished his mission and delivered his bag to his Ambassador or Minister he is not entitled to any diplomatic privileges.

The Chief of the Division of Near Eastern Affairs (Murray) to the Persian Minister (Meftah), Jan. 16, 1930, MS. Department of State, file 701/159a.

The American Ambassador to the Union of Soviet Socialist Republics informed the Department of State, in August 1935, that it was the practice of the Soviet Government to pass without examination personal baggage of the American diplomatic couriers in the Soviet Union and suggested that the same courtesy should be extended to Soviet diplomatic couriers in the United States. The Department accordingly wrote to the Secretary of the Treasury asking that the customs authorities at New York be informed of the practice of the Soviet Government and instructed to accord Soviet couriers all possible facilities upon their arrival in this country.

Ambassador Bullitt to Secretary Hull, telegram 353, Aug. 16, 1935, and Assistant Secretary Moore to the Secretary of the Treasury, Aug. 23, 1935, MS. Department of State, file 701.6111/841.

FRANKING PRIVILEGE

§417

The act of Congress approved February 14, 1929 provides that—

under such regulations as the Postmaster General shall prescribe correspondence of the members of the Diplomatic Corps of the countries of the Pan American Postal Union stationed in the United States may be reciprocally transmitted in the domestic mails free of postage, and be entitled to free registration, but without any right to indemnity in case of loss. The same privilege shall be accorded consuls of such countries stationed in the United States, and vice consuls when they are discharging the functions of such consuls, for the exchange of official correspondence among themselves, and for that which they direct to the Government of the United States.

Act. of
Feb. 14,
1929

45. Stat. 1177.

The Pan American Postal Union was established by the Principal Convention of Buenos Aires signed on Sept. 15, 1921 (42 Stat. 2154). Provision for granting the franking privilege to members of the Diplomatic Corps of the signatory countries was made in article 6 thereof. The name of the Union was changed to the "Postal Union of the Americas and Spain" in article 1 of the convention, to which Spain was a signatory, signed at Madrid on Nov. 10, 1931 at the Third Pan American Postal Congress (47 Stat. 1924).

Paragraph 2 of section 814 of the *Postal Laws and Regulations of the United States of America* (1940) provides:

"The matter that may be sent free of postage in the domestic mails under the provisions of this section [the act of Congress quoted above] shall embrace all correspondence of the members of the Diplomatic Corps of the Pan American countries and Spain; and it likewise shall embrace the official correspondence exchanged between the consulates of such of these countries as have put this provision into effect in their own countries, to that which they address to the Government of the United States . . . and to that exchanged with their respective embassies and legations, whenever reciprocity exists."

The countries the correspondence of the members of whose Diplomatic Corps is entitled to admission in the international mails free of postage are listed in the *United States Official Postal Guide, July 1940*, pt. II, p. 19.

In a note to the Salvadoran Chargé d'Affaires ad interim in 1928 the Department of State quoted from a ruling of the Post Office Department in regard to article 6 of the Pan American Principal Convention signed at Buenos Aires in 1921 (*cited ante*) in which it was stated:

With respect to that portion of the Article which contemplates that the mail of foreign consuls and of the diplomatic corps stationed in this country when addressed to the Governments [*sic*] of the United States and to other foreign consuls and diplo-

mats in the United States shall be accepted for transmission in the domestic mails free of postage, you are advised that there is no provision of the United States Postal Laws and Regulations under which such matter could be so accepted. The free use of the domestic mails is permissible only when specifically prescribed by statute.

As to the free transmission of the correspondence of the members of the diplomatic corps and consuls of the countries referred to when addressed to their respective countries, such matter can, of course, be so transmitted under the Article above quoted, from the Pan American Principal Convention of September 15, 1921, since the statutes embodied in sections 496 and 497, Postal Laws and Regulations, authorize the Postmaster General by convention to enter into agreements fixing the conditions under which mail will be exchanged with foreign countries.

Assistant Secretary Castle to Chargé Leiva, Mar. 12, 1928, MS. Department of State, file 701.09/358.

CORRESPONDENCE IN TIME OF WAR

§418

The Department of State instructed American representatives in the belligerent countries in 1914 and 1915 to inquire of the governments of those countries whether they would agree to the following regulations for American diplomatic and consular officers:

. . . First, all correspondence between American diplomatic and consular officers within . . . [Austrian, etc.] territory to be inviolable if under seal of office; second, no correspondence of private individuals to be forwarded by diplomatic and consular officers under official cover or seal; third, official correspondence between American diplomatic officers residing in different countries is not to be opened or molested if under seal of office; fourth, official correspondence under seal of office between Department of State and American diplomatic and consular officers is not to be opened or molested; fifth, pouches under seal passing between American diplomatic missions by mail or courier not to be opened or molested; sixth, correspondence other than that described in foregoing sent by ordinary mail to be subject to usual censorship.

The belligerent governments agreed substantially to this proposal, subject to various reservations on the part of certain governments.

Secretary Bryan to the Embassy at Vienna, telegram 305, Nov. 25, 1914, MS. Department of State, file 124.0665/a; Mr. Bryan to the Embassy at Paris, Dec. 18, 1914 (telegram), *ibid.* /3a; the Ambassador to Austria-Hungary (Penfield) to Mr. Bryan, telegram 334, Dec. 8, 1914, *ibid.* /1; the Ambassador to Russia (Marye) to Mr. Bryan, telegrams 146 and 162,

Dec. 11 and 20, 1914, *ibid.* /2, /4; the Ambassador to Turkey (Morgenthau) to Mr. Bryan, telegrams 306 and 182, Jan. 17 and 19, 1915, *ibid.* /7, /17; the Ambassador to France (Sharp) to Mr. Bryan, telegram 495, Jan. 26, 1915, *ibid.* /8; the Ambassador to Serbia (Vopicka) to Mr. Bryan, Dec. 24, 1914 (telegram), *ibid.* /9; the Ambassador to Germany (Gerard) to Mr. Bryan, telegram 1559, Feb. 10, 1915, *ibid.* /12; the Ambassador to Japan (Guthrie) to Mr. Bryan, no. 219, Feb. 23, 1915, *ibid.* /21; the Ambassador in London (Page) to Mr. Bryan, no. 861, Feb. 8, 1915, *ibid.* /18; 1914 For. Rel. Supp. 542-543; 1915 For. Rel. Supp. 740-742.

In Oct. 1914 the Department of State instructed the Ambassador in Great Britain that it was of the opinion that correspondence in time of war between diplomatic and consular officers in different countries sent by ordinary mail might be subject to censorship in the same manner as other private letters but that pouches under seal passing between diplomatic missions of the United States by mail or courier ought not, in the opinion of the Government of the United States, to be opened or molested by censors or other officials of foreign governments. The same might be said, it was stated, of any official correspondence under seal between diplomatic and consular officers and the Department of State. Secretary Lansing to Ambassador Page, telegram 378, Oct. 22, 1914, MS. Department of State, file 841.711/1; 1914 For. Rel. Supp. 538.

In a circular telegraphic instruction of April 23, 1915 the Department of State brought to the attention of various American diplomatic officers in Europe the following rules established by it:

1. Communications from private individuals or institutions abroad to private individuals or institutions in United States should not be sent in Department pouches.
2. Personal letters from United States Diplomatic or Consular officers or employees of American missions or consulates abroad addressed to private individuals in United States may be sent in pouches, but should be censored by heads of missions with a view to prevent transmission of statements which would otherwise be censored by Governments, and should be left unsealed with postage fully prepaid.
3. Official correspondence of diplomatic and consular officers to individuals outside of Department should be marked "Official business", and should be left unsealed.
4. Communications from nations at war to agents in the United States should not be transmitted through pouches.
5. The Department reserves right to censor all mail received in the pouches.

Use of pouch

Secretary Bryan to the Embassy at Paris, *et al.*, telegram of Apr. 23, 1915, MS. Department of State, file 124.0665/23a; 1915 For. Rel. Supp. 743.

In another circular telegram of June 12, 1915 the Department instructed the diplomatic officers that in respect to paragraph 2 above quoted it would no longer exercise the right of censorship in the case of letters from diplomatic and consular officers to members of their families transmitted in pouches and that it considered that chiefs of mission need not open and scrutinize such correspondence provided they were given satisfactory

assurances that the letters did not contain "any information regarding the war or other unneutral statements". The Secretary of State ad interim (Lansing) to the Embassy at Paris, *et al.*, telegram of June 12, 1915, MS. Department of State, file 124.0665/29b; 1915 For. Rel. Supp. 743.

In a circular instruction of Feb. 17, 1916 the Department of State said that letters addressed to diplomatic officers and sent to the Department with the request that they be forwarded were being forwarded through the diplomatic pouch and need not be unsealed. Letters marked "personal", it was said, addressed to consuls general, consuls, consular assistants, student interpreters, and other consular officers of career, sent to the Department with the request that they be forwarded, need not be unsealed, but no letters other than the foregoing addressed to consular officers of any grade would be forwarded in the pouches unless they were unsealed. The Department, it was stated, did not open a letter addressed in its care to diplomatic officers and consular officers of career. Attention was directed, however, to its earnest desire that all "clandestine" enclosures for third parties should not be delivered. Secretary Lansing to diplomatic and consular officers of the United States in belligerent countries and countries contiguous thereto, special instruction, consular, no. 448, Feb. 17, 1916, MS. Department of State, file 124.0665/32a.

The same diplomatic officers were instructed by a circular telegram of July 18, 1916 to require the signature and title of the writer of all personal mail transmitted in the diplomatic pouch on the flap of the envelop. The Acting Secretary of State (Polk) to certain diplomatic officers, July 18, 1916, MS. Department of State, file 124.0665/39a.

Later, in a circular instruction of Oct. 28, 1916 to the same diplomatic and consular officers, the Department cautioned them that mail of a personal nature should not be forwarded for private individuals or firms in the official pouches or under cover of official diplomatic or consular envelopes. It said:

"The immunity of sealed official pouches exchanged between the Department and American diplomatic missions and between American diplomatic missions in the various belligerent countries is recognized by belligerent governments upon the understanding that only official correspondence will be transmitted in those pouches. The Department has interpreted this to permit the transmission in the pouches of the sealed personal letters of diplomatic and consular officers to and from their families with the understanding that those letters shall be confined to the personal affairs of the officers and shall not relate to public or political affairs and to subjects concerning the war. All other private correspondence sent in the official pouches to consular officers is required to be unsealed in order that the Department may be able to determine whether it may properly be admitted to the pouches under the agreement with the belligerent governments.

"The foregoing does not apply to letters for private individuals (other than those specified), and firms, and the Department expects diplomatic and consular officers to exert every possible effort to exclude from the pouches all letters of this character, and to endeavor to see that the regulations issued and the agreements referred to are carried out strictly.

"Where the private letters sought to be transmitted in the pouches or under official cover relate to the protection of American interests in a manner which might properly call for the intervention of the Department, the matters may be made the subject of official despatches and forwarded in the pouches for such consideration on the part of the Department as

they may merit. Subjects coming within this category are the authentication or execution of powers of attorney or other documents necessary in the settlement of estates of American citizens or the establishment of American claims to interest in estates of foreign subjects; prize-court, requisition, or other cases affecting American neutral interests; money required for the support of American citizens; and, in general, questions relating to the non-commercial interests of American citizens which are within the legitimate jurisdiction of the Government. In each case it is imperative that careful inquiry be made into the facts in order to determine the exact nature of the American interest involved, and that those facts be set forth in the despatches to the Department.

"Documents relating to the patent rights or the patent applications of American citizens, together with correspondence relating thereto, may be forwarded in the official pouches unsealed for the Department's consideration as to whether they may be delivered to the persons in the United States for whom intended. Such correspondence or documents should be accompanied by an official despatch signed by the diplomatic or consular officer forwarding them. Letters or documents bearing upon the claims of American citizens in prize-court proceedings, when forwarded by diplomatic and consular officers, must be unsealed for the Department's consideration and should be enclosed with official despatches.

"Correspondence of private individuals and firms, nationals of countries now at war, must not be forwarded in official pouches.

"The following rules must be observed with regard to communications between Diplomatic and consular officers in the belligerent countries or between those officers and officials, private persons or firms in such countries:

"1. Consular officers in one country should not correspond directly with Diplomatic missions in other countries but only with the mission in the country of their residence which will when necessary take up with the other missions matters contained in such correspondence.

"2. Consular officers may continue to correspond with other consular officers on matters of strictly American consular business.

"3. Diplomatic and consular officers should refrain from correspondence with officials of Governments other than that to which they are accredited.

"4. Diplomatic and consular officers should refrain from direct correspondence with business organizations or private individuals in countries at war with the country of their residence.

"5. Welfare inquiries and personal and business messages for business organizations and individuals should be transmitted only through the Diplomatic mission in the country in which the Consul is stationed, to the mission in the country to which the message is to be sent, and then delivered by the latter mission to the Foreign Office of that country. Such messages are not normal diplomatic or consular business and when transmitted under official cover directly to the interested parties, violate the regulations of the belligerent Governments, while the transmittal through the Foreign Offices renders the friendly service desired and relieves American officials of all responsibility or charge of unneutrality.

"6. All official correspondence referred to in item 5 above, should be sent unsealed in order that the mission which is held responsible for forwarding or delivering it may be able to satisfy itself of the contents of the communications."

Secretary Lansing to certain diplomatic and consular officers, special instruction, consular, no. 486, Oct. 28, 1916, MS. Department of State, file 124.0665/46a.

In Jan. 1917 the Department of State declared that its instruction of Oct. 28, 1916 might be interpreted to mean that private business letters of members of an embassy staff relating to their personal affairs might be transmitted through the official pouch under the same provisions as letters to their families. The Second Assistant Secretary of State (Adee) to the Ambassador in France (Sharp), no. 1507, Jan. 11, 1917, MS. Department of State, file 124.0665/50.

The Department amended its instruction of Oct. 28, 1916 on Jan. 24, 1917 so as to permit the transmission in diplomatic pouches of the correspondence of American Red Cross doctors and nurses and American missionaries in Bulgaria, Rumania, Serbia, and Turkey, provided that such correspondence was submitted unsealed and contained no unneutral statements and no enclosures intended for third parties. Mr. Adee to the Ambassador in Turkey (Elkus), no. 280, Jan. 24, 1917, MS. Department of State, file 124.0665/51b.

The Embassy in Petrograd in Apr. 1917 informed the Department of State that American business firms were handicapped by the delay occasioned by congested censorship and irregular postal service maintained by the Provisional Government in Russia. The Embassy was authorized by the Department to forward private commercial correspondence in the diplomatic pouch if the letters were left unsealed, carried the required postage, and were passed by the Russian censor. Secretary Lansing to the Embassy at Petrograd [Leningrad], telegram 1331, Apr. 18, 1917, MS. Department of State, file 124.0665/61.

"1. Unsealed official communications from foreign diplomatic missions may in exceptional cases be accepted for transmission in the pouch. After an examination of their contents, you may, in your discretion, forward them to the Department or to another American mission with a separate explanatory despatch in every case.

"2. Sealed communications from neutral diplomatic missions should not be accepted for transmission in the pouch. Requests of that nature should be courteously declined with an explanation that this Government, under war conditions, is unable to make exceptions.

"3. Sealed communications from the diplomatic missions of the belligerents of this Government may in exceptional cases be accepted for transmission in the pouch in cases where no pouch service is maintained by the mission with Washington or with the capital to which the communication is to be forwarded. An explanatory despatch should accompany the communication in every case."

Secretary Lansing to the diplomatic officers, Apr. 19, 1918, MS. Department of State, file 124.0665/82A.

In Aug. 1914 the Austro-Hungarian Minister at The Hague brought to the American Minister at that place a message from his Government for transmission to the American Legation in Brussels for the Austro-Hungarian Legation in that city. He read the message to the American Minister in German but offered it for transmission in a cipher which the latter could not read. The American Minister expressed his regret that his instructions prohibited him from sending a message in two different ciphers, i.e. his own and another. His action was approved by the

Department of State. Minister van Dyke to Secretary Bryan, no. 125, Aug. 14, 1914, and Mr. Bryan to Mr. van Dyke, no. 58, Sept. 4, 1914, MS. Department of State, file 763.72/667.

The American Legation in Peking [*Peiping*] was instructed by the Department of State in 1918 not to accept any further correspondence of neutral legations to be transmitted through the diplomatic pouch, since under censorship regulations correspondence under the official seal of a neutral legation and addressed to its foreign office was considered privileged matter and should be forwarded through the open mail. The Acting Secretary of State (Polk) to the Legation at Peking, telegram of June 7, 1918, MS. Department of State, file 124.0665/91a.

It will be readily understood that since the entrance of the United States into war the Government of the United States is under the necessity of taking measures not contemplated in normal times. The Acting Secretary of State, presenting his compliments to Their Excellencies and Messieurs, the Heads of Diplomatic Missions at Washington, has, therefore, the honor to request them to agree to the following restrictions in the dispatch of their diplomatic mail to countries abroad.

Foreign
diplomatic
officers in
the United
States

That only the official correspondence of the Diplomatic Mission shall be sent under official cover or seal of office.

That diplomatic pouches shall contain no private letters except those of Diplomatic or Consular officers *de carrière*.

Memorandum of the Department of State to the heads of diplomatic missions at Washington, July 25, 1917, MS. Department of State, file 701.03/14a.

In a memorandum addressed to the Swiss Legation on Nov. 1, 1917, the Department of State modified its ruling set forth above as follows:

"Inasmuch as the Swiss Legation states that there are no Swiss Consular Officers *de carrière* in this country, the Department of State is pleased to extend the privileges mentioned in that Memorandum to all Swiss Consular Officers in the United States. It is expected however in availing themselves of this privilege that Consular as well as Diplomatic Officers will not forward private letters other than their own." Memorandum of the Department of State to the Swiss Legation, Nov. 1, 1917, MS. Department of State, file 701.03/31a.

The Department of State informed the heads of diplomatic missions at Washington on January 5, 1918 that the following regulations governing the censorship of letters entering and leaving the United States had been put into force:

1. Uncensored correspondence is permitted between Embassies and Legations and their respective Governments, when under official seal.
2. Uncensored correspondence is permitted between Embassies and Legations in the United States and Embassies and Legations of the same Power situated in other countries, when under official seal. The same applies to similar official correspondence in transit through the United States.

4. Private letters addressed to Chiefs of Mission in the United States will not be subject to censorship.
5. No private correspondence whatsoever of individuals or firms shall be forwarded to or from diplomatic or consular officers under official cover or seal. Personal correspondence of diplomatic and consular officials shall not contain letters forwarded in behalf of third persons.

The interested governments were requested to give written guaranty in this regard.

The Secretary of State (Lansing) to the heads of diplomatic missions at Washington, Jan. 5, 1918, MS. Department of State, file 811.711/165a; 1918 For. Rel., Supp. 1, vol. II, p. 1755.

On the same day the Secretary of State wrote to the heads of the diplomatic missions at Washington representing countries alined with the United States in the war, in regard to exceptions which had been made to the regulations governing censorship of mails entering and leaving the United States. He said:

"The transmissions of uncensored private mail of diplomatic officials of the Allies, to and from all countries, will be permitted, provided that mail originating with a diplomatic official bear the name and rank of the official, together with the official seal of the mission to which he is accredited, and provided that mail intended for a diplomatic official bear his name and official rank together with the name and address of the sender."

The Secretary of State (Lansing) to the heads of certain diplomatic missions in Washington, Jan. 5, 1918, MS. Department of State, file 811.711/277a; 1918 For. Rel., Supp. 1, vol. II, pp. 1755-1756.

The Secretary of State informed the Japanese Ambassador in November 1917 that the Secretary of the Navy had stated that his Department had no objection to the use of a private code or of the Japanese language by the financial attaché of the Japanese Embassy. Secretary Lansing to Ambassador Sato, no. 51, Nov. 20, 1917, MS. Department of State, file 811.731/307.

Use of code
by neutrals,
1918

On September 7, 1918 a circular note signed by the Secretary of State was mailed to the chiefs of mission at Washington representing neutral countries, stating that the following regulations governing the exchange of cablegrams in code or cipher had been put into force:

Cablegrams may be exchanged in any code or cipher, when the official title of the addressee and that of the sender appear in plain language so as clearly to identify both addressee and sender:

Between a neutral home government and its diplomatic representatives wherever located;

Between a consular representative of such a government in an oversea possession of the United States and its diplomatic representative in the United States.

Such cablegrams, whether in code or clear, will be expedited.

On the same day he sent a circular note to the chiefs of mission representing the countries associated with the United States in the war, regarding regulations governing the exchange of cablegrams in code or cipher, which read:

Use of code
by belliger-
ents, 1918

Cablegrams may be exchanged in any code or cipher:

Between a Government co-operating with the United States in the prosecution of the war and its diplomatic or consular representatives;

Between such a diplomatic representative and other diplomatic or consular representatives of his own Government.

Such cablegrams, whether in code or clear, shall be expedited. The address or signature or both may be in code when the code words have been furnished to the Chief Cable Censor.

Circular notes of Aug. 26, 1918 (mailed Sept. 7, 1918), MS. Department of State, file 811.731/478a.

In September 1939 official correspondence addressed to the American Legation in Athens arrived there bearing an official British notice "opened by the censor". The American Minister brought the matter to the attention of the British Minister in Athens, who replied that he had been instructed by the British Foreign Office to express the sincere regret of His Majesty's Government at this unfortunate mistake.

Minister MacVeagh to Secretary Hull, no. 3463, Oct. 11, 1939, MS. Department of State, file 841.711/2790.

Mail addressed to the American Minister and the American Legation at Monrovia was censored by the British authorities at Freetown. The Department of State instructed the American Embassy in London to call the matter to the attention of the British authorities and to ask whether such censorship was authorized. The Embassy replied that the British Foreign Office had conveyed both its own apologies and those of the censorship authorities in regard to the interference and had given assurances that necessary instructions had been given to prevent a recurrence of such an incident.

Secretary Hull to the Embassy at London, telegram 1494, Nov. 24, 1939, MS. Department of State, file 841.711/2821A; the Counselor of Embassy (Johnson) to Mr. Hull, telegram 2654, Dec. 16, 1939, *ibid.* /2849.

In November 1939 the Department of State instructed the Embassy in London to present a request to the British Foreign Office that general instructions be issued to British censorship officials directing them to desist from further interference with American diplomatic and consular mails. The Department listed several complaints concerning the censorship of such mails. In a note of February 1, 1940 the Foreign

Office informed the American Chargé d'Affaires ad interim, *inter alia*, that "according to the censorship regulations both diplomatic and consular correspondence, if addressed to a State Department and if certified as emanating from a diplomatic mission or consulate (in order that its authenticity may be assured), is exempt from examination, though discretion has inevitably to be left to examiners as to whether a particular governmental institution is to be regarded as a State Department for the purposes of examination". Regret was expressed that instructions could not be issued in the general sense desired by the Government of the United States.

The Acting Secretary of State (Welles) to the Embassy at London, telegram 1448, Nov. 17, 1939, MS. Department of State, file 841.711/2791; N. B. Ronald, of the British Foreign Office, to Chargé Johnson, Feb. 1, 1940 (enclosure in despatch 4548 from the Embassy at London, Feb. 3, 1940), *ibid.* /3032.

In March 1940 the Embassy at Berlin reported to the Department of State that it was in receipt of a circular *note verbale* from the German Foreign Office saying that letters from abroad addressed to diplomatic missions or their members were, according to regulations, not opened and that such communications were delivered without delay to their destination. The Embassy stated that it had brought to the attention of the German authorities infringements of these regulations and that the Foreign Office had expressed its regrets and had stated that the authorities concerned with Embassy mail had received strict instructions to leave untouched both incoming and outgoing diplomatic and consular communications.

The Chargé d'Affaires ad interim at Berlin (Kirk) to the Secretary of State (Hull), no. 2059, Mar. 11, 1940, MS. Department of State, file 862.711/81.

CEREMONIAL

RULES OF PRECEDENCE

§419

The Foreign Service Regulations of the United States provide:

. . . The Department has adopted the following rules, based upon those laid down at the Congress of Vienna and the Congress of Aix-la-Chapelle, on the precedence and relative rank of diplomatic representatives of the various nations:

- (a) *Order of precedence.* The order of precedence is:
 - (1) Ambassadors extraordinary and plenipotentiary.
 - (2) Envoys extraordinary and ministers plenipotentiary.
 - (3) Ministers resident.
 - (4) Chargés d'affaires *ad hoc*.
 - (5) Chargés d'affaires *ad interim*.

(b) *Precedence among representatives of the same rank.* Diplomatic representatives take precedence in their respective classes according to the date of the official notification of their arrival.

For. Ser. Reg. U.S. II-5, n. 4, Jan. 1941.

In response to an inquiry as to the course to be followed in the entertainment of the Ambassador of the French Republic at a celebration to be held in Pennsylvania, the Department of State said:

Foreign
ambassadors

His Excellency Mr. André de Laboulaye, the Ambassador of the French Republic, is addressed in conversation as "Excellency" or "Mr. Ambassador" and would rank above American officials except the President, the Vice President, and the Governor of the State in which the ceremonies take place. Should the question arise as to the rank of the Ambassador with relation to the Governor, it would in accordance with custom be courteous for Governor Pinchot to waive his rank in favor of Ambassador de Laboulaye.

A foreign ambassador is entitled to a salute of nineteen guns.

Secretary Hull to Representative Walter, Apr. 14, 1934, MS. Department of State, file 811.452/126. To the same effect, see the Chief of the Division of International Conferences and Protocol (Dunn) to Miss Francesca Cosgrove, Apr. 4, 1929, *ibid.*/62.

At the Statue of Liberty celebration in New York in 1936, Mr. de Tessan, the Under Secretary of State of the French Republic, was appointed by the French Prime Minister to represent that country. The Department of State informed the National Statue of Liberty Fiftieth Anniversary Committee that Mr. de Laboulaye, as the duly accredited Ambassador of France, took precedence over Mr. de Tessan. The Chief of the Division of Protocol and Conferences (Southgate) to Maurice Leon, telegram of Oct. 27, 1936, MS. Department of State, file 811.415 Statue of Liberty/50.

According to present practice in Washington in both diplomatic and American houses, foreign ministers plenipotentiary precede the Undersecretary of State who, in turn, precedes American ambassadors and ministers at home on leave or in retirement.

Foreign
ministers

Secretary Hull to the Embassy at Tokyo, telegram 42, Mar. 6, 1937, MS. Department of State, file 811.452/156.

The Government of the United States appointed a Special Ambassador to attend the coronation of the Emperor of Ethiopia in 1930. The local Diplomatic Corps at Addis Ababa insisted that since the French Special Ambassador at the ceremony was a military marshal he should have precedence over the American and all other special ambassadors who were not of royalty. The Department of State instructed the Legation at that place that the general rules establishing precedence among special ambassadors to a coronation were usually determined by the government concerned but that it could

Military
or naval-
officers

not agree that personal military rank should affect precedence. The Legation was authorized so to inform the Ethiopian Government, but it was instructed to take no further action.

Secretary Stimson to the Legation at Addis Ababa, telegram 34, Oct. 14, 1930, MS. Department of State, file 884.001 Selassie 1/167.

In answer to an inquiry concerning the order of precedence accorded (at the White House on occasions of official functions given by the President) to American Ambassadors Extraordinary and Plenipotentiary, accredited or appointed to foreign countries, especially with reference to such Ambassador's rank with an Admiral of the Navy and with a General or Lieutenant General of the Army, Assistant Secretary Adee stated that—

not having a regular diplomatic service like that of the Army and the Navy with individual rank personally attaching to all representatives, we do not regard an American Ambassador while in this country as bracketed with the Ambassadors accredited here by a foreign country. In the case you name, an Ambassador at home or on leave would rank after an Admiral or Lieutenant General in any function given at the White House. I may add that an ex-Ambassador, after his retirement from the service, is with us regarded as a distinguished private citizen.

In the house of a foreign diplomat the case would be different, as for instance if an Ambassador should entertain the American representative near his sovereign, our Ambassador would in the theory of extraterritoriality be within the diplomatic bounds of the country to which he is accredited and, therefore, would be *en fonction*.

Our rule would, of course, not apply in Japan where you have a regular permanent service with the official grade attaching to each officer personally.

The Assistant Secretary of State (Adee) to the Japanese Ambassador (Hanihara), Oct. 21, 1907, MS. Department of State, file 9293.

Chargés
d'Affaires

In an instruction to the Chargé d'Affaires ad interim in Mexico City in 1908 the Department of State said that, at any diplomatic dinners and receptions, it gave a Chargé d'Affaires of Embassy precedence over a Chargé d'Affaires of Legation, regardless of whether, while serving in such temporary capacity, he might be actually the First, Second, or Third Secretary of Embassy. In other words, it was said, a Chargé d'Affaires ad interim took precedence over any Secretary of Embassy or Legation, and if he were in charge of an Embassy he took precedence over a Chargé of Legation.

Acting Secretary Bacon to Chargé Sands, no. 587, Oct. 29, 1908, MS. Department of State, file 14319/63.

The Soviet Embassy informed the Department of State on March 19, 1934 of the arrival in Washington of its naval attachés, one of whom (Mr. Oras) was stated to have the rank of Vice Admiral, and the other (Mr. Yakimichev) the rank of Rear Admiral. The Navy Department objected to the recognition of the attachés as having the ranks stated, saying that the officers were personally quite acceptable to it but that the ranks with which they appeared in Washington were causing it much embarrassment. It was customary, it was said, in the exchange of naval attachés, for both to be approximately of the same rank and have approximately the same amount of experience and length of service in their respective navies. The Navy Department stated that it was impossible for the Government of the United States to send an officer to the Soviet Union of the rank of Vice Admiral because of the laws of the United States and that it was also impracticable to send an officer of the rank of Rear Admiral. An attaché in the rank of Vice Admiral, it declared, by virtue thereof outranked every Chief of Bureau in the Navy Department, and, furthermore, as a matter of comity among the foreign naval attachés in Washington, the injection of such a rank among them caused embarrassment.

Naval
attachés

The views of the Navy Department were informally communicated to the Soviet Embassy by the Department of State, and the Ambassador replied that his Government attached no particular importance to rank but that at a farewell luncheon to the French naval attaché, who had been acting as dean of the corps of naval attachés in Washington, that attaché had turned over the duties of dean of the corps to the Soviet Vice Admiral (Oras) and that thereupon the latter had been recognized by all of the assembled attachés as the new dean of their corps. The Ambassador accordingly expressed the hope that, while his attaché's rank could be reduced to that of captain, he could nevertheless retain the status of dean of the corps. The Navy Department consented to recognize Admiral Oras as a Rear Admiral, which rank automatically continued him in the position of dean of the corps of naval attachés, provided that in this rank he would be junior to all the officers of equal rank on duty in the Navy Department in Washington. Mr. Yakimichev was recognized by the Navy Department as holding the rank of commander.

Memorandum of July 20, 1934 on "Ranks Accorded in Washington to the Soviet Military and Naval Attachés and Their Assistants" (enclosure to instruction 151 to the Ambassador to Moscow, July 24, 1934), MS. Department of State, file 701.6111/788.

. . . Foreign Consuls General rank according to the length of time they have served in that capacity in the United States.

Foreign
consuls
in U.S.

States. . . . Consuls rank in the same way and . . . Vice Consuls rank in the same manner.

The Assistant Secretary of State (White) to the Reverend Brother Ignasiak, Aug. 19, 1932, MS. Department of State, file 811.452/101.

Papal
Nuncio

The Minister at San José reported to the Department of State in 1908 that the Papal Nuncio to Central America had requested the Costa Rican Government to give him priority of position at official ceremonies, that on such occasions precedence had previously been given him as Dean of the Diplomatic Corps, and that the Costa Rican Minister of Foreign Affairs was not disposed to admit any change but had suggested that the Minister ascertain the views of the Department on the subject. The Department referred the Minister to its instruction of August 7, 1903 to the Minister in Chile and said:

In those countries where official recognition is given to the spiritual power of the Pope, it generally happens that the nuncio is accorded priority on ceremonial occasions by way of courtesy, even if not a recognized right under the rules of the Congress of Vienna. To this the Department can raise no objection. Such priority is, of course, to be distinguished from the Dean's precedence in material questions before the Corps.

The matter however is properly one for action by the Government of the country, or, failing that, for the Diplomatic Corps itself.

Acting Secretary Adee to Minister Merry, no. 802, Sept. 24, 1908, MS. Department of State, file 15657.

The instruction of Aug. 7, 1903, just referred to, reads:

"The precedence of the diplomatic representative of the Holy See in Catholic countries which maintain diplomatic relations with the Vatican was discussed very fully by Mr. Caleb Cushing while United States Minister to Spain, with the conclusion that Papal nuncios and legates are ambassadors under the rulings of the Congress of Vienna, notwithstanding the absence of the Pope's temporal power. (Foreign relations, 1875, page 1115.)

"In the present instance, the representative of the Holy See at Santiago is entitled 'Delegate and Envoy Extraordinary' which would appear to take him out of the ambassadorial class and rank him with Envoys Extraordinary and Ministers Plenipotentiary who do not possess the personal representative character. Monsignor Monti would not, therefore, appear to claim precedence in the quality of ambassador, ranking, as such, as the sole representative of the First Class at Santiago.

"Monsignor Monti's position among his colleagues of the Second, or Plenipotentiary Class, is determinable, on general principles, by the custom of the country to which he is accredited, and which, by accepting him in accordance with the credentials he bears, establishes his position as a member of the foreign diplomatic body.

"In many countries, the government which receives the foreign representative fixes his ceremonial precedence. In others, as in the United

States, any dispute as to personal precedence is left to be settled by the diplomatic body.

"Unless it should appear that the Chilean Government itself decides the point of Monsignor Monti's precedence that question would properly remain for the diplomatic body to consider and determine, having regard to the clear distinction between a Nuncio, Internuncio or Legate, and a Delegate who is also accredited as Envoy Extraordinary.

"Your course in questioning the competency of the actual Dean of the diplomatic corps to decide the point for himself, without conference with his colleagues, is approved and it is hoped that the incident will lead to an authoritative determination of the matter, either by the Government of Chile, or by a vote of the diplomatic body.

"So far as this Government is concerned, it can have no objection to the assignment of the Papal Delegate and Envoy to the position of Dean, even if such assignment were not founded on positive right, but were complimentary on the part of his colleagues. All that the Department desires to see is concurrent and harmonious action among the foreign representatives."

The Acting Secretary of State (Adee) to the Minister to Chile (Wilson), no. 243, Aug. 7, 1903, MS. Department of State, 18 Instructions, Chile, 89, 90-92.

. . . I cannot find that the Department has at any time made a ruling as to the relative rank of a Cardinal of the Roman Catholic Church with American officials and foreign diplomatic representatives accredited to the United States. While the Department has expressed its views in specific cases as to the order of precedence of American officials, there has never been any official order or ruling by the President definitely fixing their relative rank. Cardinals are not accredited to this Government and have no official status before this Government, and therefore no official precedence. They are merely officers of a church, and as they have no official status before this Government, and as Church and State are separate in this country, they would, so far as I can see, in any official function of this Government, have no right of precedence before members of the Diplomatic Corps or the officials of the Government of the United States. Any such precedence, therefore, would be a matter of courtesy to be taken up in any particular case with the officials concerned.

Cardinals

Secretary Hughes to Mr. Cunliffe-Owen, Apr. 21, 1924, MS. Department of State, file 811.452/37.

In response to a memorandum from the heads of diplomatic missions in Washington regarding the precedence that should be accorded to the sister of the Vice President of the United States, whom he had designated as his hostess, the Secretary of State stated that—

neither Mr. Kellogg nor any other Secretary of State has intended to make any official rulings as to the precedence in which American officials and their wives should be received within the houses of the members of the Diplomatic Corps, but that such decision

Officials
of U.S.

rests wholly within the discretion of the members of that Corps themselves. I should be glad, therefore, if you would kindly convey to your colleagues in reply to their memorandum that any course which they take in reference to such matters will meet with no objection on the part of the State Department, and that any courtesy which they may choose to show the Vice President and to Mrs. Gann will be most agreeable to me.

The Secretary of State (Stimson) to the British Ambassador (Sir Esme Howard), Apr. 9, 1929, MS. Department of State, file 811.452/68.

**U.S.
Foreign
Service
officers**

Foreign Service officers assigned to a mission shall rank in the following order of precedence: (a) counselors; (b) first secretaries; (c) second secretaries; (d) third secretaries; and (e) language officers.

For. Ser. Reg. U.S. VIII-6, Jan. 1941; Ex. Or. 8076, Apr. 4, 1939.

On the question as to the precedence to be accorded a position combining the functions of Counselor of Embassy and Consul General, the Department of State expressed the opinion that since the officer holding the position would assume the duties of Chargé d'Affaires ad interim in the absence of the Ambassador and the Senior Counselor, the position should have precedence over all attachés except in cases where these functions were performed by general officers of the Army and Marine Corps or flag officers of the Navy.

The Under Secretary of State (Phillips) to the Ambassador in Paris (Straus), no. 760, Feb. 19, 1935, MS. Department of State, file 123K25/379.

The Department of State informed the Embassy in Habana in 1925 that the second secretary of Embassy ranked after the military attaché but before the assistant military attaché; that the third secretary of Embassy ranked after the assistant military attaché; and that the fact that the officers in question might be considered for purposes of chancery administration as "acting" first and second secretaries did not affect their rank *vis-à-vis* the military and assistant military attachés.

Secretary Kellogg to the Embassy at Habana, telegram 69, June 1, 1925, MS. Department of State, file 127.62/44.

**First Secretaries
of
Embassy and
Consuls
General**

Regarding the order of precedence of First Secretaries of Embassy and Consuls General, the Department of State called attention to its circular instruction of January 22, 1908 transmitting an Executive order to the effect that "on occasions of ceremony, other than purely diplomatic functions, Consuls General rank with, but next before, Secretaries of Embassy", and added:

In view of the wording of this order, the Department can give no general instructions covering the question of precedence as

between Consuls-General and First Secretaries of Embassy, as the two offices hold equal rank. It must rest with yourself to determine on each occasion whether the function to be attended is "purely diplomatic" or otherwise, preference being given to the Consul-General when you are in doubt. However, in the specific case to which you refer, namely your audience with the Sultan, your statement that you would have placed the First Secretary ahead of the Consul-General, had the former been present, is approved, as in the Department's opinion such a function can only be regarded as "purely diplomatic", in fact so "purely diplomatic" that at many, if not most Courts, Consular officers are not included with a diplomatic representative's staff at his audience.

The Acting Secretary of State (Wilson) to the Ambassador in Paris (Straus), no. 23, Oct. 27, 1909, MS. Department of State, file 9293/8.

For rules of precedence relating to Foreign Service officers and other officers of the United States Government, see For. Ser. Reg. U.S. IX-3, n. 1, Jan. 1941; Ex. Or. 8356, Mar. 2, 1940.

SOCIAL INTERCOURSE

§420

In regard to conformity to ceremonial usage the Foreign Service Regulations of the United States provide:

. . . On all formal occasions the diplomatic representative shall be governed by the ceremonial usage of the country of his official residence.

For Ser. Reg. U. S. II-5, n. 3, Jan. 1941.

. . . The diplomatic representative shall, immediately upon his arrival, familiarize himself with the local rules regarding official calls. In his initial official visits, he should be accompanied by the ranking Foreign Service officer assigned to the mission in a diplomatic capacity.

A chargé d'affaires need not pay official calls upon his colleagues upon assuming charge if he be at the post at the time he is accredited. After assuming charge, he should call upon the Minister for Foreign Affairs on the latter's first general reception day.

For. Ser. Reg. U. S. II-5, n. 1, Jan. 1941.

The American Chargé d'Affaires and other foreign diplomatic representatives in Panama received notes from the Ministry of Foreign Affairs requesting them to attend the official reception by the President of Panama of the Nicaraguan Minister, when the latter presented his credentials. The Department of State informed the Chargé that each country prescribed its own formalities for such

occasions and that, while no uniform rule was observed in this regard and while the attendance of the Diplomatic Corps at the reception of a new member was unusual, acquiescence appeared to be an act of courtesy alike to the Government of Panama and to the new colleague.

Acting Secretary Adee to Chargé Weitzel, no. 204, Sept. 7, 1909, MS. Department of State, file 14319/118-119.

**Meetings
of the
Diplomatic
Corps**

It is the understanding of the Department that, excepting in countries such as China, where there exists a definite organization of the diplomatic representatives of the so-called treaty powers, for the purpose of discussion with a view to the taking of concerted action regarding the rights of their nationals, the functions of the diplomatic body meeting as such should not normally extend beyond the consideration of ceremonial matters and subjects related to the rights, immunities and privileges of its members in the country to which they are accredited. The discretion of the representative acting as Dean of the Diplomatic Corps in determining whether to comply with the request of one of his colleagues to call a meeting of that body is thus correspondingly limited. It is, of course, the duty of the Dean to satisfy himself in each case that the object for which a meeting is desired is a proper one and not susceptible of causing offense to any of the Governments concerned.

Moreover the obligations of a diplomatic officer to his colleagues must necessarily be subordinate to his obligation to the country which he represents. He should, therefore, be exceedingly careful to avoid creating embarrassment for his own government and should consequently refrain from initiating or participating in formal discussions among his colleagues concerning matters coming within his government's jurisdiction.

The Under Secretary of State (Grew) to the Minister to Panama (South), no. 307, May 19, 1925, MS. Department of State, file 701.0019/7.

**Officials
of unrecognized
governments**

Before the Secretary of State of the United States visited Brazil in 1922 he instructed the Ambassador that such entertainments as he might give at Rio de Janeiro would be held in honor of Brazil and the centennial of its independence, and that it would therefore be discourteous not to invite guests of the Brazilian Government such as the Mexican and Greek Special Ambassadors or even resident diplomats and that such ambassadors or diplomats should therefore be included in invitations to any entertainments he might give to which all other special representatives to the Centenary and resident diplomats were invited. This would in no way imply, he said, recognition of the governments of those two countries.

Secretary Hughes to the Ambassador at Rio de Janeiro, telegram 109, Aug. 14, 1922, MS. Department of State, file 033.1120H87/11.

The Minister in Austria received a note from the newly appointed Soviet Minister in that country, identical with notes to the other Legations in Vienna, informing him that he had presented his credentials and would be happy to establish official and personal relations with him. The Department of State told the Minister that he might personally and unofficially acknowledge the Soviet Minister's note and informally receive him if he called but that he should not return his call or otherwise assume any official relation. The Soviet Government had not been recognized by the United States.

Secretary Hughes to Minister Washburn, telegram 24, May 27, 1924, MS. Department of State, file 707.1161/4; 1924 For. Rel., vol. II, p. 675.

The Finnish Foreign Minister and his wife issued invitations to the chiefs of mission in Helsingfors for a farewell dinner in honor of the Norwegian Minister, who had recently been named Minister to Moscow. Upon learning that the Soviet Minister in Helsingfors was invited to the dinner, several of the foreign representatives in that city declined to attend. The Department of State instructed the Chargé that he should accept the invitation and that the fact that the Government of the United States had not recognized the regime in Moscow should cause him no embarrassment.

Secretary Hughes to Chargé Hall, telegram 18, Aug. 26, 1924, MS. Department of State, file 707.1161/11; 1924 For. Rel., vol. II, p. 676.

The Department of State instructed the Ambassador in Mexico that if the new Soviet Minister to Mexico was a duly accredited diplomatic representative and if as Dean of the Diplomatic Corps he were called upon to present him to the President of Mexico at the official reception, he should do so; moreover, if he were obliged as Dean to call a meeting of the Diplomatic Corps, the Soviet representative should be notified if he were present in the capital.

Secretary Hughes to Ambassador Sheffield, telegram 506, Nov. 3, 1924, MS. Department of State, file 707.1161/17; 1924 For. Rel., vol. II, p. 677.

For correspondence regarding cooperation with the Soviet Ambassador as Dean of the Diplomatic Corps at Peking, see 1925 For. Rel., vol. I, pp. 636 *et seq.*

The American judge on one of the Mixed Courts in Egypt in 1918 objected to a rule established by the Sultan prescribing the court dress. The Department of State instructed the Agent and Consul General at Cairo that, while it could not undertake to determine the judge's status under Egyptian law, the Mixed Courts of Egypt were to be regarded as Egyptian courts so far as the Government of the United States was concerned and that since he was a judge of an Egyptian court he might well be regarded as an Egyptian official.

Court
dress

The Director of the Consular Service (Carr) to the Agent and Consul General at Cairo (Gary), no. 52, May 28, 1918, MS. Department of State, file 883.05/119. Cf. For. Ser. Reg. U.S. II-5, n. 3, Jan. 1941.

Use of
flag by
American
Minister

The Minister to Norway on September 17, 1906 wrote to the Department of State requesting that he be furnished with a Minister's flag for use at the bow of a boat when he was obliged to use one on the water of the fjord in an official capacity. The Department replied that—

there being no authority for placing any blazon or device on the American flag by which to denote the ministerial or consular office, it follows that the ordinary regulation flag is the only one that can be flown over a Minister's residence or at the *stern* of a boat occupied by him. If in addition to the national flag it be found desirable, for local reasons, for you to display a personal distinguishing flag at the *bow* of a boat occupied by you, there would be no objection to your preparing a boat flag, showing a circle of thirteen white stars on a blue field, like the authorized consular boat flag, but with the American coat-of-arms in the center of the circle instead of the consular letter "C". It should be understood, however, that such a boat flag is merely personal, not having national significance.

Secretary Root to Minister Peirce, no. 19, Oct. 19, 1906, MS. Department of State, minor file, vol. 43.

"Neither diplomatic nor consular officers are required to display on their motor vehicles any insignia indicating the country of which the officials are nationals. Some diplomatic officers, however, place on their motor vehicles the coats of arms of their respective countries." The Acting Solicitor for the Department of State (Baker) to D. L. Shoemaker, Apr. 7, 1930, MS. Department of State, file 701/161.

In regard to the ceremonies attendant upon a visit by an American diplomatic or consular officer to an American or foreign man-of-war, see XI *American Foreign Service Journal* (1934) 463, and extracts therefrom set forth in diplomatic serial 2501 to American diplomatic and consular officers, Aug. 29, 1935, MS. Department of State, file 811.451/34. See also For. Ser. Reg. U.S. IX-5, Jan. 1941; Ex. Or. 8196, July 8, 1939.

EXECUTIVE CONTROL OF FOREIGN RELATIONS

§421

In regard to the control of the foreign relations of the United States, a memorandum prepared in the Office of the Solicitor for the Department of State says:

The Constitu-
tion

As Congress possesses no power whatever in international diplomacy it cannot delegate it. The Constitution of the United States contains no express provision for a Department of Foreign Affairs, and contains but very few provisions concerning the

method by which the foreign relations are to be managed. However, it impliedly gives the President the power to manage foreign affairs by giving him, in addition to other "executive" powers, the power to appoint diplomatic and consular officers abroad, to participate in the making of treaties with the approval of the Senate (Const. Art. II, secs. 2 and 3), and to give Congress information upon the state of the Union. This was no oversight; for the Articles of Confederation pursued a different course,—foreign relations were entrusted to the Continental Congress. The national government is one of restricted powers. The President may do nothing that the national government may not do. But where, by the terms of the Constitution, the national government is vested with control over a certain sphere of action, that portion of the field is the President's which is executive in character. (Const. Art. II, sec. 1, sub-sec. 1.)

Articles of
Confederation

One of the most distinguished members of the Constitutional Convention, Roger Sherman, advocated in that assembly the theory that the executive magistracy should be instituted for the sole purpose of doing the behests of the Legislature; that it should be elected by and responsible to Congress. He proposed that Congress should be vested with the power of organizing the executive in the manner which it might deem the most advantageous. (*The Madison Papers*, vol. II, p. 763.) But his opinion found no favor in the Convention, which decided that the President should be independent of the Legislature. The Constitution does not delegate to the Senate the general power to supervise the administration; only in specific instances is the Senate's approval needed for executive acts.

THE DEPARTMENT OF STATE

While the President of the United States is the official spokesman in dealing with other nations, the actual conduct of foreign affairs is vested in the Secretary of State. The Department of State was organized July 27, 1789 by Act of Congress. (1 Stat. 28.) The act provided that the Secretary of State should perform and execute such duties as the President should intrust to him, agreeable to the Constitution relative to correspondence, commissions, and instructions to the public ministers and consuls sent out from the United States, and also pertaining to negotiations with the public ministers from foreign States. The Secretary of State is, therefore, to conduct all matters respecting foreign affairs which the President may assign to his Department, and must manage the business as the President may direct.

Duties of the
Secretary
of State

There was a real distinction made between this Department on the one hand, and the Treasury Department, for instance, on the other. The difference lies in the fact that the Treasury Department was created solely for the purpose of carrying out enactments of Congress. In all things concerning money the legal "impulse to action" had, from the nature of things, to come from Congress. This was not at all true of the "Foreign Department". *The sole purpose of that organization was to carry out, not orders, as expressed in legislation or resolutions, but the will of the executive.*

In all cases the President could direct and control, but in the "presidential" Department he could determine *what should be done*, as well as *how it should be done*.

In 1886 at the time that President Cleveland declined to transmit certain papers concerning the administration of the office of the District Attorney of the Southern District of Alabama, he took occasion to challenge the attitude contained in the majority report of the Senate Committee of March 1, 1886, that because the executive departments were created by Congress, the latter had supervisory power over them. He said:

"I do not suppose that 'the public offices of the United States' are regulated or controlled in their relations to either House of Congress by the fact that they were 'created by laws enacted by themselves.' It must be that these instrumentalities were created for the benefit of the people and to answer the general purposes of government under the Constitution and the laws, and that they are unencumbered by any lien in favor of either branch of Congress growing out of their construction, and unembarrassed by any obligation to the Senate as the price of their creation." (17 Cong. Rec., pt. 2, 49th Cong., 1st sess., p. 1902.)

Memorandum of Oct. 1, 1930, prepared in the Office of the Solicitor for the Department of State, in connection with S. Res. 253, 71st Cong., 2d sess., MS. Department of State, file 331.1121 W./143½, enclosure.

The President is charged under the Constitution with the responsibility of conducting the foreign relations of the United States. The Secretary of State is his adviser in these matters and acts as the agent through whom instructions to the Foreign Service are issued. It follows that ambassadors and ministers of the United States report to and receive their instructions from the Secretary of State.

In the absence of the Secretary of State, the Under Secretary of State becomes Acting Secretary of State, and as such he is the agent through whom the President issues his instructions to the Foreign Service.

The Assistant Secretary of State (Messersmith) to B. C. Gladstone, Sept. 27, 1937, MS. Department of State, file 121.41/77.

Participation in conferences

In 1906 certain Democratic Senators led by Senator Bacon of Georgia disapproved of President Theodore Roosevelt's participation, without consulting the Senate, in the Conference of Algeciras. In defending the President, Senator Spooner of Wisconsin said that the Constitution "rests the power of negotiation and the various phases—and they are multifarious—of the conduct of foreign relations exclusively in the President. And . . . he does not exercise that constitutional power, nor can he be made to do it, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined." He also stated:

The act creating the Department of State, in 1789, was an exception to the acts creating the other Departments of the Government. I will not stop to refer to the language of it . . . but it is a Department that is not required to make any reports to Congress. It is a Department which from the beginning the Senate has never assumed the right to direct or control, except as to clearly defined matters relating to duties imposed by statute and not connected with the conduct of our foreign relations.

We *direct* all the other heads of Departments to transmit to the Senate designated papers or information. We do not address directions to the Secretary of State, nor do we direct requests, even, to the Secretary of State. We direct requests to the real head of that Department, the President of the United States, and, as a matter of courtesy, we add the qualifying words, "if in his judgment not incompatible with the public interest."

What does the conduct of our foreign relations involve? Does it involve simply, do Senators think, the negotiation of treaties? It involves keeping a watchful eye upon every point under the bending sky where an American interest is involved, where the American flag and citizens of the United States are to be found on sea and on land, every movement in foreign courts which might invade some American interest.

Cong. Rec., vol. 40, pt. 2, pp. 1418, 1420 (Jan. 23, 1906).

The Secretary of State, however, does at times voluntarily act as a transmitting agent for communications between Congress and foreign governments. Thus, in 1908 House and Senate resolutions deploring the assassination of the King and Crown Prince of Portugal were transmitted by the Secretary of State to the Portuguese Government.

Transmission
of messages

H. Doc. 741, 60th Cong., 1st sess.; S. Doc. 317, 60th Cong., 1st sess.

The Tariff Act approved August 5, 1909 stipulated in section 4 that the President "shall have power and it shall be his duty to give notice, within ten days after the passage of this Act", to all countries with which commercial agreements had been entered into in conformity with section 3 of the act approved July 24, 1897, of the intention of the United States to terminate such agreements. Preliminary notice of the intended termination of the agreements affected had been given on April 30, 1909; final notice was given on August 6 and 7, 1909.

Congress:
termination
of treaties

36 Stat. 11, 83; U. S. Tariff Commission, *Reciprocity and Commercial Treaties* (1919) 228.

By the terms of section 16 of the La Follette Seamen's Act, approved March 4, 1915, the President was requested and directed, within 90 days after the passage of the act, to give notice of termination of such provisions of treaties and conventions between the United States and

foreign governments as were in conflict with the provisions of the act. President Wilson entered into such negotiations.

38 Stat. 1164, 1184. See further the discussion in vol. V, ch. XVI on "Treaties", §509, of this Digest.

Section 34 of the Jones Merchant Marine Act, approved June 5, 1920, "authorized and directed" the President, within 90 days after the effective date of the act, to give notice of termination of treaties or conventions to which the United States was a party which restricted the right of the United States to impose discriminating customs duties on imports entering the United States in foreign vessels and which also restricted the right of the United States to impose discriminatory tonnage dues on foreign vessels entering the United States. Although President Wilson did not veto the act, because to have done so "would have sacrificed the great number of sound and enlightened provisions which it undoubtedly contains", Secretary Colby announced on September 24, 1920 that the President did "not deem the direction contained in Section 34 of the so-called Merchant Marine Act an exercise of any Constitutional power possessed by the Congress". He stated that the treaties, 32 in number, did not contain provisions for their termination in the manner contemplated by Congress and that the action sought to be imposed on the Executive "would amount to nothing less than the breach or violation of said treaties".

41 Stat. 988, 1007; Department of State, Mimeographed Press Release, Sept. 24, 1920; *New York Times*, Sept. 25, 1920, pp. 1, 8.

See also the letter from President Wilson to Senator Fall of Dec. 8, 1919, regarding the latter's proposed resolution requesting the President to sever diplomatic relations with the Carranza government in Mexico, vol. I, p. 164, of this Digest.

Court decisions

The joint resolution of Congress approved May 28, 1934 provided that, if the President should find that the prohibition of the sale of arms and munitions of war in the United States to the countries then engaged in armed conflict in the Chaco might contribute to the establishment of peace between those countries, and if, after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he might deem necessary, the President should make proclamation to that effect, it would be unlawful to sell, except under such limitations and exceptions as he might prescribe, any arms or munitions of war in any place in the United States to the countries engaged in the armed conflict or to any person, etc., acting in the interest of either country, until otherwise ordered by the President or by Congress. 48 Stat. 811. In the case of *United States v. Curtiss-Wright Export Corp. et al.* the defendants contended that the resolution was unconstitutional

in that it constituted an unlawful delegation of legislative power to the Executive. In denying the contention, the Supreme Court, speaking through Mr. Justice Sutherland, said, *inter alia*:

Whether, if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. . . .

It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. *Carter v. Carter Coal Co.*, 298 U.S. 238, 294. That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, "the Representatives of the United States of America" declared the United [not the several] Colonies to be free and independent states, and as such to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do."

As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never

been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *Annals*, 6th Cong., col. 613.

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is *requested* to furnish the information "if not incompatible with the

public interest." A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.

299 U.S. 304, 315-316, 318, 319-320, 321 (1936).

In the case of *United States v. Belmont et al., Executors*, the Supreme Court, speaking through Mr. Justice Sutherland, in considering the recognition of the Soviet Government by the President coincident with the assignment by that Government to the Government of the United States of all amounts due to it from American nationals, said:

. . . That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government.

301 U. S. 324, 330 (1937).

The minister of foreign affairs in his public character is the regular political intermediary between the state and foreign government. He has plenary authority to represent his state at conference and diplomatic negotiations. 3 Genet, *Traite de Diplomatie et de Droit Diplomatique* 1932, 162; Hall, *Treatise on International Law* (6th Ed. by Atlay) p. 295.

If the minister is commissioned to undertake special negotiations of a public character which require his presence in a foreign jurisdiction, he must and usually is furnished with powers to negotiate. The powers may be embodied either in an ordinary letter of credence or in special letters patent. These powers within reasonable limits define the authority for his acts, which acts will be binding upon his government. Hall, *Treatise on International Law* (6th Ed. by Atlay) p. 295. While no authority has been found, respecting the principle of public international law or national policy, which conflicts with the recognition in the minister for foreign affairs of a nation of the power to alienate the proprietary rights or interests of his nation by the execution of an assignment in his name, still there are here sufficient reasons upon which we may conclude presumptively that he had such powers.

As to the authority of Foreign Commissar Litvinoff to make the assignment on behalf of his government, there is a presumption of authority in his designation, recognition, and the President's acceptance of the assignment. It is a matter of political action in foreign affairs, and the question of who represents and acts for a sovereign or nation in its relation to the

United States is determined, not by the Judicial Department, but exclusively by the political branch of the government. Lehigh V. R. Co. v. State of Russia, [21 F. (2d) 396 (C.C.A. 2d, 1927)] . . . Doe ex dem. Clark v. Braden, 16 How. 635, 656, 14 L. Ed. 1090; Hyde on International Law, Vol. 1, p. 368; Terlinden v. Ames, 184 U. S. 270, 288, 22 S. Ct. 484, 491, 46 L. Ed. 534.

State of Russia v. National City Bank of New York et al., 60 F. (2d) 44, 47 (C.C.A. 2d, 1934).

Charles Henry Butler states that with the exception of three functions, namely, the making of treaties, the appointment of Ambassadors and Ministers, and the declaration of war, "the control of foreign relations is generally conceded to be an executive act". II Butler, *Treaty-Making Power of the United States* (1902) 357-360.

James Bryce states in his treatise on "The American Commonwealth" that when the House, or the House and Senate, passes resolutions enjoining or disapproving a particular line of foreign policy, "the President is nowise bound by such resolutions, and has more than once declared that he does not regard them. . . . He, or rather his secretary of state, for the President has rarely leisure to give close or continuous attention to foreign policy, retains an unfettered initiative, by means of which he may embroil the country abroad or excite passion at home." I Bryce, *The American Commonwealth* (1911) 54.

"Two principles, limiting Congressional interference with the Executive powers, are clear. *First*, Congress may not exercise any of the powers vested in the President, and *second*, it may not prevent or obstruct the use of means given him by the Constitution for the exercise of those powers." Taft, *Our Chief Magistrate and His Powers* (1916) 126.

"The President, being entrusted with the right of conducting all negotiations with foreign governments, is the sole judge of the expediency of instituting, conducting or terminating them in respect of reclamations for injuries sustained by citizens abroad." Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916) 108.

". . . The second ingredient of the President's power as the organ of communication with foreign states is his power to nominate and, with the advice and consent of the Senate, to appoint 'ambassadors, other public ministers, and consuls.'

"More recently, President Wilson's fondness for sending agents abroad without consulting the Senate as to their appointment has provoked criticism, but, it would appear, without good reason from the point of view of precedent. At the same time, it is difficult to harmonize the practice, considering the dimensions it has today attained, with a reasonable construction of the Constitution. Such agents have been justified as 'secret agents,' yet neither their existence nor their mission is invariably secret. They have been called 'private agents of the President,' his 'personal representatives,' yet they have been sometimes commissioned under the great seal. They have been justified as organs of negotiation and so as springing from the Executive's power in negotiating treaties, yet this is also a normal function of our regular representatives. They have been considered as agents appointed for special occasions, but, as we have seen, the term 'public ministers' of the Constitution is broad enough to include

all categories of diplomatic agents. Theoretically, perhaps, they could not claim full diplomatic privileges abroad, yet practically, if their identity were known, they would probably be accorded them.

"In short, the only test which is generally available for distinguishing this kind of agent from the other kind is to be found in the method of their appointment and in the fact that they are usually paid out of the 'contingent fund.' In no other way has the notion of the President's prerogative in the field of foreign relations asserted itself more strikingly.

"But 'the balance of the Constitution' has a way of asserting itself, and in another respect the President has apparently lost authority touching diplomatic appointments. I refer to such legislation as that represented by the Acts of March 3, 1893 [27 Stat. 497], and of March 2, 1909 [32 Stat. 672], the former of which purported to 'authorize' the President to appoint 'ambassadors' in certain cases, and the latter of which, in repealing the earlier act, ordains in effect that new ambassadorships may be created only with the consent of Congress. The question is: What effect may validly be given such legislation?

"... it should be regarded merely as a notification from the Congress which passed it that it would appropriate no money for the salaries of new ambassadorships, a notification which succeeding Congresses would naturally be under no obligation to heed, since Congress can limit its own discretion as little as it can the President's.

"... the principal fruits of the doctrine that the control of foreign relations is an executive prerogative may be summarized thus: an unlimited discretion in the President in the recognition of new governments and states; an undefined authority in sending special agents abroad, of dubious diplomatic status, to negotiate treaties or for other purposes; a similarly undefined power to enter into compacts with other governments without the participation of the Senate; the practically complete and exclusive discretion in the negotiation of more formal treaties, and in their final ratification; the practically complete and exclusive initiative in the official formulation of the nation's foreign policy."

Corwin, *The President's Control of Foreign Relations* (1917) 49, 64-66, 70, 205-206.

"Applying the principle broadly, the contention that one department of the Government may in any way coerce another is a repudiation of the very purpose of the division of power, and would result in the destruction of that freedom under law which the Constitution aims to establish. If such an attempt were for any reason successful, it would result in the establishing of an autocratic form of government. Absolutism, which the Constitution was intended to prevent, might thus creep in through the usurpation of power by a single department, or even by a single officer of the Government. There could be no greater offense against the Constitution than this, and public opinion should unite in condemning even the suggestion of it." David Jayne Hill, *Present Problems in Foreign Policy* (1919) 163.

"... The conduct of foreign relations pertains to the executive power, and the executive power of the Nation is vested in the President, subject to the exceptions and qualifications expressed in the Constitution." Charles

Evans Hughes, "Some Observations on the Conduct of Our Foreign Relations", 16 A.J.I.L. (1922) 367.

"... But where, by the terms of the Constitution, the national government is vested with control over a certain sphere of action, that portion of the field is the President's which is executive in character. Thus the Constitution makes the national government the sole organ for the conduct of foreign affairs. And yet the powers which are necessary for it to take this duty upon it are not all conferred by the Constitution—the power to recognize new governments or new States, to dismiss foreign ministers, even to conduct general negotiations. Since they are not enumerated they are the President's as of constitutional right, being of an executive character." Thach, *Creation of the Presidency, 1775-1789* (1922) 165.

"The position of the President as the representative organ implies that foreign nations are entitled to present their claims to him but it also implies: (a) that they can communicate with the nation through him alone and (b) that they may take cognizance of all his official acts. Efforts of foreign governments to communicate with organs of the United States other than the President or his representatives, with private American citizens or with the American people directly have been protested by the President, while efforts of American organs of government or self-constituted missions to communicate with foreign nations have been vetoed or prohibited by law. ... Foreign ministers who have tried to talk over the head of the government directly to the people have been sharply rebuked." Wright, *Control of American Foreign Relations* (1922) 28-29.

"Congress may also ask the President to undertake diplomatic or treaty negotiations, and the request may have moral, although not legal, weight in determining the Chief Executive's action.

"Congressional requests for diplomatic instructions after they have been given and acted upon is a less serious interference with executive power than an attempt by Congress, or either branch thereof, to dictate to the President or to participate with him in the giving of such instructions, or to give them directly."

John Mabry Mathews, *Conduct of American Foreign Relations* (1922) 25, 90.

USE OF OFFICIAL DOCUMENTS

§422

In refusing a request by a private attorney to be furnished with duly certified copies of affidavits, official reports, diplomatic correspondence, and other documents relating to a claim filed with it, the Department of State said:

... The Department can only furnish copies of diplomatic correspondence for use by way of evidence in the courts, in cases in which such action will not be prejudicial to the public interest and in which it is affirmatively made to appear that the particular paper requested is relevant to some judicial inquiry and that substantial justice requires that it be furnished.

The Assistant Secretary of State (Bacon) to Messrs. Penfield and Penfield, Jan. 16, 1908, MS. Department of State, file 3636/131.

It is not the practice of the Department of State to furnish a private litigant with copies of correspondence between the Department and a third party in the absence of a statement from the latter that he has no objection thereto. In certain classes of cases the Department states that, if the court in which the litigation is pending considers that the correspondence is essential to the administration of justice in the case, it will consider a request from the court for the privilege of examining the correspondence or for copies of it.

In response to a request from the Department of Justice in 1906, the Department of State instructed the Embassy at Mexico City to request the Mexican authorities to direct the collector of customs who was on duty in April-May 1916 at Ciudad Porfirio Díaz to appear in the United States District Court at San Antonio, Texas, during its December term and produce the original records of the customs house at Ciudad Porfirio Díaz for use in the case of the *United States v. Louis Oechenger*—involving alleged smuggling. The Mexican Government declined to direct the collector of customs to appear in person, on the ground that his absence would be injurious to the work of his post, but agreed to supply the Ambassador with certified copies of the requested documents and such other papers as might be needed in the judicial proceedings of the United States.

Acting Secretary Bacon to Ambassador Thompson, no. 104, Sept. 6, 1906, and Mr. Thompson to Secretary Root, no. 250, Oct. 10, 1906, MS. Department of State, file 700/2, /9.

For regulations as to use of the original records of the Department of State, contained in Departmental Order 796 of June 19, 1939, see Department of State, I *Bulletin*, no. 1, p. 10 (July 1, 1939).

The Guatemalan Foreign Office in 1926 asked the American Legation in that country to furnish certain information regarding, and a copy of, a document in the Legation archives. The Minister was instructed that the Legation archives were not public records, that the Guatemalan courts had no right to ask for copies of documents therefrom, and that he should therefore, in case of similar requests, decline to give information such as was asked for without first obtaining instructions from the Department.

Embassy
and legation
records

Under Secretary Grew to Minister Geissler, no. 899, Mar. 31, 1926, MS. Department of State, file 814.6463Em7/120.

The attitude assumed by the American Ambassador in Cuba in declining to allow the military attaché of the Embassy access to the confidential records for transmission to the War Department was approved. The Third Assistant Secretary of State (Wright) to the Secretary of Embassy in Cuba (Engert), Apr. 3, 1924, MS. Department of State, file 124.376/35.

Historical
research

Request was made for permission to consult the archives of the American Embassy in Paris, as well as the library, in connection with the preparation of a historical work. The Ambassador was told that the question of granting the permission could be left with the Embassy for decision and that if the Ambassador was satisfied that the person was a responsible student and that his purpose in making extracts from the records was to prepare a faithful historical record devoid of sensationalism, he might extend to him such privileges as were available. It was added:

The Department is disposed to view historical research in the archives, both in the Department and in the missions, with favor. However, certain precautions are to be observed. Occasionally a journalist or one who has no previous experience in historical writing seeks to get into the archives for the purpose of lifting out of its proper historical background some item which if published by itself gives a distorted picture, creates a sensation, and may cause more or less embarrassment to the conduct of foreign relations. It is important in deciding upon an application to be assured that the applicant is a bona fide historical student and competent to make a fair presentation of his subject. You should also beware of those who present themselves in the guise of historical students but whose purpose is to abstract correspondence which may be used for the purpose of filing claims.

In examining the notes of searchers you should bear in mind that even where there is no objection whatever to releasing the notes the Department may be interested in knowing what is being abstracted. You should, therefore, make a report to the Department upon all searches not only clearly stating who the searcher is but giving a brief outline of the period and subject covered and drawing special attention, if the subject warrants it, to any phase of the subject in which the Department is likely to be interested.

You should also be careful to limit your approval strictly to the notes of the searcher so that the approval cannot be interpreted as an official one for the article or book in which the notes are used. Occasionally a searcher finds it more convenient to present his notes for review in the form in which he wishes eventually to use them and it is sometimes a convenience to the reviewer to have the material presented in that way. However, obviously, approval can be extended only to the notes themselves.

It is of course understood that access to the archives must always be contingent upon the resources of the Embassy to provide suitable desk room and such supervision as may seem advisable to make sure that the papers consulted suffer no damage in the handling.

Under Secretary Grew to Ambassador Herrick, no. 2111, Dec. 3, 1926, MS. Department of State, file 124.516/71.

CHAPTER XV

CONSULS

APPOINTMENT AND CLASSIFICATION

§423

States are usually represented in other states by officers who, generally speaking, fall within two main classifications, namely, diplomatic and consular officers. These officers may be differentiated in several respects, the principal of which are (a) by the method of their appointment, (b) by their functions, and (c) by their privileges and immunities in the receiving state.

Prior to the passage of the act of Congress of May 24, 1924 entitled "An Act For the reorganization and improvement of the Foreign Service of the United States, and for other purposes" (43 Stat. 140), the diplomatic and consular service of the United States was for the most part made up of two separate and distinct classes of officers. Appointments to one branch of the service did not qualify the appointees to serve in the other branch. The appointees were known respectively as diplomatic or consular officers.

By the above-mentioned act it was provided, in section 1, that "The Diplomatic and Consular Service of the United States shall be known as the Foreign Service of the United States." The act was amended by the act entitled "An Act For the grading and classification of clerks in the Foreign Service of the United States of America, and providing compensation therefor" approved February 23, 1931 (46 Stat. 1207). These and earlier acts of Congress regarding diplomatic and consular officers as embodied in title 22 of the United States Code contain, *inter alia*, the following provisions:

Foreign
Service
officers

§2. . . . The official designation "Foreign Service officers", as employed throughout sections 3 to 23, inclusive, of this chapter, shall be deemed to denote permanent officers in the Foreign Service below the grade of minister, all of whom are subject to promotion on merit and who may be appointed to either diplomatic or consular positions or assigned to serve in the Department of State subject to section 15 of this title, at the discretion of the President.

§4. . . . All appointments and promotions of Foreign Service officers shall be made by the President by and with the advice

and consent of the Senate and such officers may be commissioned as diplomatic or consular officers or both: . . . *And provided further,* That all official acts of such officers while serving under diplomatic or consular commissions in the Foreign Service shall be performed under their respective commissions as secretaries or as consular officers. (As amended June 29, 1935, c. 337, 49 Stat. 436.)

§5. . . . Appointments to the position of Foreign Service officer shall be made after examination, and officers so appointed shall serve a suitable period of probation in an unclassified grade or, under such rules and regulations as the President may prescribe, after five years of continuous service in an executive or quasi-executive position in the Department of State, by transfer therefrom: *Provided,* That no candidate shall be eligible for examination for Foreign Service officer who is not an American citizen and who shall not have been such at least fifteen years: . . .

§6. . . . All appointments of Foreign Service officers shall be by commission to a class and not by a commission to a particular post, and such officers shall be assigned to posts and may be transferred from one post to another by order of the President as the interests of the service may require:

§23. . . . All provisions of law enacted prior to February 23, 1931, relating to diplomatic secretaries and to consular officers, which are not inconsistent with the provisions of this subchapter, are made applicable to Foreign Service officers when they are designated for service as diplomatic or consular officers, and all Acts or parts of Acts inconsistent with this subchapter are hereby repealed.

Classes

Title 22 of the Code, §51, defines the terms "consul general, consul, consular agent, vice consuls, and consular officer" as follows:

First. "Consul general" and "consul" shall be deemed to denote full, principal, and permanent consular officers as distinguished from subordinates and substitutes.

Second. "Consular agent" shall be deemed to denote consular officers subordinate to such principals exercising the powers vested in them and performing the duties prescribed for them by regulation of the President at posts or places different from those at which such principals are located, respectively.

Third. "Vice consuls" shall be deemed to denote consular officers subordinate to such principals exercising and performing the duties within the limits of their consulates at the same or at different points and places from those at which the principals are located, except that when vice consuls take charge of consulates general or consulates when the principal officers shall be temporarily absent or relieved from duty they shall be deemed to denote consular officers who shall be substituted, temporarily, to fill the places of said consuls general or consuls.

Fourth. "Consular officer" shall be deemed to include consuls general, consuls, vice consuls, interpreters in consular offices, student interpreters, and consular agents, and none others.

The Foreign Service Regulations, section II-8, January 1941, state:

The term "consular officers" shall include consuls general, consuls, Foreign Service officers commissioned as vice consuls, language officers, vice consuls, and consular agents. [Ex. Or. July 17, 1939.]

Title 22 of the United States Code, §178, provides:

. . . The word "consul" shall be understood to mean any person invested by the United States with, and exercising, the functions of consul general, consul, or vice consul. (R.S. §4180; Feb. 1, 1876, c. 6, 19 Stat. 2; Feb. 15, 1915, c. 23, §6, 38 Stat. 806.)

Pursuant to the provisions of the Reorganization Act of 1939 the President, on May 9, 1939, transmitted to Congress Reorganization Plan II, which contains the following provisions:

SECTION 1. . . .

(a) *Foreign Commerce Service and Foreign Agricultural Service.*—The Foreign Commerce Service of the United States and its functions in the Bureau of Foreign and Domestic Commerce of the Department of Commerce and the Foreign Agricultural Service of the United States and its functions as established by the Act of June 5, 1930 (46 Stat. 497), in the Department of Agriculture are hereby transferred to the Department of State and shall be consolidated with and administered as a part of the Foreign Service of the United States under the direction and supervision of the Secretary of State.

Reorganiza-
tion Plan
No. II

(b) *Functions of the Secretary of Commerce and the Secretary of Agriculture Transferred to the Secretary of State; Exceptions.* . . .

(c) *Status of Foreign Service Officers.*—Foreign Commerce Service officers and Foreign Agricultural Service officers who by reason of transfer to the Foreign Service of the United States and by appointment according to law acquire status of Foreign Service officers therein shall not be included in the total number of officers in such Service for the purpose of determining the percentage limitation established by section 10 of the Act of February 23, 1931 (46 Stat. 1207), as amended.

53 Stat. 561, 1431.

By joint resolution of June 7, 1939 Congress provided that the above Reorganization Plan II should take effect on July 1, 1939. 53 Stat. 813.

With reference to a statute of the State of Kentucky providing for the execution of a deed before a "Minister, or consul, or secretary of legation of the United States" the Department of State said:

A strict construction of this statute would preclude even the Consul General from executing the document, as a "consul" only and not a "consul general" is mentioned. However on this point I may add that the general interpretation of the term "consul" in the United States statutes includes both consuls and consuls general.

The Chief Clerk (Carr) to the Kentucky Title Company, May 19, 1909, MS. Department of State, file 19594/-2.

In July 1936 the Swiss Legation in Washington informed the Department of State that Treasury officials had denied a Swiss Consul General the benefits of the convention signed by the United States and Switzerland, November 25, 1850, on the ground that the convention referred only to consuls and vice consuls and not to consuls general. In letters of October 5, 1936 and December 31, 1936 to the Treasury Department, the Department of State said that the convention should be considered to include consuls general because (1) at the time it was negotiated the office of consul general had been newly created and was not generally referred to in treaties; (2) the term "consul" in its generic sense includes "consul general"; (3) treaties should be construed liberally; and (4) the term "consul" is used in a generic sense both in the Constitution (art. II, sec. 2) and the laws of the United States (22 U. S. C. §§ 51, 178, 191, 192). The Treasury Department replied, April 28, 1937, expressing the opinion that—

under the provisions of Article VII of the Convention . . . and also under similar provisions in treaties or conventions with other countries, the exemption to which consuls and vice consuls are entitled extends to consuls general, but not, however, to consular officers of lesser rank than those specifically named in granting the exemption.

The Swiss Legation to Secretary Hull, July 17, 1936, MS. Department of State, file 702.5411 Taxation/1; the Assistant Secretary of State (Carr) to the Secretary of the Treasury (Morgenthau), Oct. 5, 1936, *ibid.* 702.5411 Taxation/2; the Acting Secretary of State (Moore) to Mr. Morgenthau, Dec. 31, 1936, *ibid.* 702.5411 Taxation/6; the Acting Secretary of the Treasury (Magill) to Mr. Hull, Apr. 28, 1937, *ibid.* 702.5411 Taxation/8.

In a suit for divorce brought in the New York courts by the Chancellor of the French Consulate General at New York, the plaintiff, a French citizen, moved to dismiss the defendant's counter claim on the ground that the court had no jurisdiction to render

judgment against him. The contention was based principally on article 2 of the consular convention of April 1853 between the United States and France reading in part as follows:

The Consuls-General, Consuls [,] Vice-Consuls or Consular Agents of the United States and France, shall enjoy in the two countries the privileges usually accorded to their offices, such as personal immunity, except in the case of crime, . . .

Consular pupils shall enjoy the same personal privileges and immunities as Consuls-General, Consuls, Vice-Consuls or Consular Agents.

In case of death, indisposition or absence of the latter, the Chancellors, Secretaries, and Consular pupils attached to their offices, shall be entitled to discharge *ad interim* the duties of their respective posts; and shall enjoy whilst thus acting the prerogatives granted to the incumbents.

[1 Treaties, etc. (Malloy, 1910) 529-530.]

Exemption was also claimed under subdivision 8 of section 25 of the Federal Judicial Code by which jurisdiction in all suits or proceedings against consuls or vice consuls is vested exclusively in the Federal courts. The plaintiff attempted to bring himself under these provisions by asserting that the office of the vice consul in the French consular service had been abolished and the duties taken over by chancellors, who should accordingly be extended the privileges and immunities accruing to that office under the above convention and statutory provision. Certificates of the French Consul General establishing the status of the chancellor as a French consular officer ranking only after the consul general and consul and above the deputy consul, and stating that it was the practice of the United States to have the exequatur of the President issued only to the consul general, were filed with the court. The court in dismissing the motion said:

But the difficulty with these certificates is that, if they were to be accepted as establishing that plaintiff's office is virtually that of a vice consul, and that he is therefore entitled to immunity, notwithstanding a difference in nomenclature, the result would be to confer upon the consul general the power to grant immunity whenever, in his judgment, an attaché of his office was performing functions corresponding to those of a vice consul of the United States. A reference to articles I and V of the Convention of 1853 will show that the intention of the contracting parties was that each government should approve the appointments of persons accredited to it by the other before the appointees should have the status of consular officers. I do not say that it is necessary that the President shall issue an exequatur to each of these officials. But I do hold that, before they can be recognized by the courts as entitled to the privileges and im-

munities of consuls or vice consuls, or other consular officials, there must be evidence that they have been recognized as such officials by the executive branch of the federal government.

Moracchini v. Moracchini, 213 N.Y. Supp. 168, 169-170, 126 Misc. 443 (Sup. Ct., N.Y. Cy., spec. term, 1925). To similar effect, see *The Lonsdale Shop, Inc. v. Bibily et al.*, 213 N.Y. Supp. 170, 126 Misc. 445 (N.Y. Mun. Ct., 1925); *Tailored Woman, Inc. v. Bibily*, 212 N.Y. Supp. 704 (N.Y. Mun. Ct., 1925).

In a note dated May 29, 1925, with reference to the same case, the French Ambassador notified the Department of State that the chancellor of the consulate was the same as the vice consul and was accordingly believed to be entitled to the immunities and prerogatives of the vice consul and requested that the Department bring this notification officially to the court's attention. In refusing the request the Department pointed out that article 2 of the convention clearly distinguished between the privileges to be accorded chancellors and those to be accorded consular officers and that it seemed clear that a chancellor was not deemed by the contracting parties to be a consular officer. The Department also stated that—

changes effected by the French Government in the titles of individuals employed in its service are purely a domestic matter and would not suffice to alter a treaty concluded between our two countries which placed in a non-consular class persons designated as Chancellors.

I cannot conclude that an individual whom your Government not only describes, but also accredits, as it were, in the capacity or quality of a Chancellor of a Consulate General in France is a consular officer within the meaning of the treaty.

In view of the foregoing considerations, I am satisfied that no useful purpose would be served were this Department to cause the information contained in your note to be notified to the judicial authorities of the State of New York . . . unless it were accompanied by an intimation that this Government did not purport to acquiesce in the conclusion of law asserted therein. You have made formal request that I cause instructions to be issued to have Mr. Pierre Moracchini's name "appear officially on the list of French consular officers in the United States in the capacity of Chancellor of the Consulate General of France in New York". I regret that I am unable, for the reasons noted above, to accede to this request.

Ambassador Daeschner to Secretary Kellogg, May 29, 1925, and Mr. Kellogg to Mr. Daeschner, June 13, 1925, MS. Department of State, file 702.5111/207.

In a letter of July 17, 1937 to the Treasury Department concerning the meaning of "career" consular officers, the Department of State said:

In the American Foreign Service, all counselors of embassy or legation, diplomatic secretaries, consuls general, consuls, and vice consuls of "career", are appointed after examination, or "under such rules and regulations as the President may prescribe, after five years of continuous service in an executive or quasi-executive position in the Department of State, by transfer therefrom . . ." (U. S. Code, Title 22, sec. 5.) All the grades of officers mentioned, including consuls general and consuls, are *career* officers, except vice consuls, who are *career* officers only when appointed as stated. Vice consuls of *career* are commissioned by the President as vice consuls; vice consuls *not of career* are commissioned by the Secretary of State as occasion may require, usually from among the clerks at consular offices, and they receive compensation as clerks and not as vice consuls. . . .

Career and
honorary
consuls

All career consular officers in the American Foreign Service, and also vice consuls not of career, must be American citizens, and are not permitted to engage in private business . . .

Based on international usage, career consuls (or *consules missi*) are public officials of the sending state who are nationals of the state and who are not permitted to engage in private business of any kind, and as public functionaries enjoy certain prescribed privileges and immunities.

The term "career" thus used serves to distinguish these functionaries from "honorary" consular officers who are not necessarily nationals of the state they represent, and are not forbidden to engage in private business. Honorary consular officers, therefore, do not usually enjoy the privileges and immunities accorded to consular officers of career.

The Assistant Secretary of State (Carr) to the Secretary of the Treasury (Morgenthau), July 17, 1937, MS. Department of State, file 702.60C11 Taxation/23.

"As . . . [he] is an honorary and not a career consul and is an American citizen, he is not entitled to the rights and privileges normally appertaining to consular officers of career of foreign governments. Of course, this does not affect the immunities enjoyed by the consular archives of the German Government which may be in . . . [his] possession." The Secretary of State (Hull) to the Attorney General (Murphy), Oct. 18, 1939, *ibid.* 702.6211/1061.

. . . the title of "Foreign Service Officer" is intended to apply only to career officers in the Foreign Service, as contemplated by the Act of May 24, 1924.

Assistant Secretary Carr to Vice Consul Eaton, Feb. 27, 1930, MS. Department of State, File 120.3/270.

With reference to a proposed conference of American consular officers in Great Britain and Northern Ireland, the Department of State instructed the Consul General in London to assign vice consuls to replace the officers to be temporarily absent from their posts and said:

. . . If non-career officers are chosen for this relief duty they should, on the date of departure from their regular post, take oath and file bond as Vice Consul at the post to which they are temporarily detailed. Upon the termination of their detail they will, on the date of departure for their regular post, again take oath and file bond as Vice Consul at such regular post.

Assistant Secretary Carr to Consul General Halstead, Apr. 4, 1930, MS. Department of State, file 125.0041 Conference/1.

The American Consul General at Capetown made inquiry of the Department of State as to precedence between honorary consuls and officers of career, the question arising with reference to selection of the Dean of the Consular Corps. After remarking that the matter concerned other governments and was for the sole decision of the body in question, the Department said that—

in cases which have arisen in the American service, it has been the practice of the Department to rank an officer of career over one who holds an honorary title, and it would seem desirable in all such cases as the one at hand, that the ranking career officer be selected as the Dean of the Corps.

Consul General Murphy to the Department of State, no. 2696, Mar. 17, 1920, and the Director of the Consular Service (Carr) to Mr. Murphy, no. 685, May 1, 1920, MS. Department of State, file 122.43/2.

Under a consular regulation providing that "when the principal officer is absent the Vice Consul, or if there be more than one, the one whose commission bears the earliest date . . . will assume full charge of the office", the Department of State held, in January 1920, that when there were two vice consuls at a post, one of career and the other not of career, the commission of the latter antedating that of the former, the "Vice Consul de carrière is considered to be the ranking vice consul at your post, and under present circumstances he would assume charge of the office in your absence."

Consul Jaeckel to Secretary Lansing, no. 60, Dec. 27, 1919, and the Director of the Consular Service (Carr) to Mr. Jaeckel, no. 52, Jan. 24, 1920, MS. Department of State, file 122.51/8. In an instruction of Jan. 29, 1920 the Department of State said that "Career vice consuls rank non-career men." Mr. Lansing to the Consul at Athens, telegram of Jan. 29, 1920, *ibid.*, 122.51/9.

In reply to an inquiry as to "the nature of the oath, if any, which is required of consular officers who are not citizens of the United States", the Department of State said that—

Citizenship
and oath

the Act approved February 5, 1915, contains the following provision:

"Every consul general, consul, vice consul and, whenever practicable, every consular agent, shall be an American citizen".

A portion of Section 12 of Public No. 715, 71st Congress, approved February 23, 1931, also contains the following provision:

"... Provided, That no candidate shall be eligible for examination for Foreign Service officer who is not an American citizen and who shall not have been such at least fifteen years."

Section 13 of the Consular Regulations provides, in part, as follows:

"13. OATH OF OFFICE. Whenever any person is appointed to any office of honor or trust under the Government of the United States he shall, before entering upon the duties of his office take . . . oath: . . . R. S. 1757; U.S.C. title 5, sec. 16.

"The foregoing requirement applies to all Foreign Service officers, secretaries in the diplomatic service, consuls general, consuls, vice consuls, language officers, and if citizens of the United States, to consular agents. . . ."

Consular
agents

It will be observed that consular agents, who are not citizens of the United States, are not included in the above-mentioned requirement, and therefore, do not take oath.

The Acting Secretary of State (Phillips) to Senator Walsh, Dec. 12, 1934, MS. Department of State, file 120.311/3.

In 1907 the German Ambassador in Washington requested that the American consular agent in Tripoli, Syria, be permitted to hold at the same time the office of German Vice Consul. The Department declined the request, referring to article I, section 9, of the Constitution forbidding any officer of the United States to accept an office from any foreign government without the consent of Congress. In 1909 the Ambassador informed the Department that, due to the inability of his Government to obtain the services of a suitable person, he was instructed to request that the consent of Congress be obtained permitting the American officer to accept the appointment. The Department declined to request such consent, stating that it was not considered desirable to establish a precedent. At the same time the Department offered to instruct its agent to take custody of the German Consulate and to use his good offices on behalf of German

Dual relation-
ship

subjects pending the appointment of a German officer, adding that "such authorization can not include the performance of consular acts for the German Government".

Ambassador Steinburg to Secretary Root, Oct. 14, 1907, and Acting Secretary Adee to Mr. Sternburg, Oct. 18, 1907, MS. Department of State, file 8130/6; Count von Bernstorff to Secretary Bacon, Feb. 16, 1909, and Mr. Bacon to Count von Bernstorff, Feb. 27, 1909, *ibid.* 8130/10; Count von Bernstorff to Secretary Knox, Apr. 2, 1909, *ibid.* 8130/11; 1909 For. Rel. 265-268.

To similar effect, see: the Assistant Secretary of State (Phillips) to Consul Rairden, Sept. 10, 1909, MS. Department of State, file 21424/A; Mr. Rairden to Secretary Knox, no. 384, Dec. 2, 1909, and the Assistant Secretary of State (Hale) to Mr. Rairden, Jan. 14, 1910, *ibid.* 21424/1; the Chief Clerk of the Department of State (Carr) to Consul Ragsdale, Nov. 17, 1909, *ibid.* 10113/7-8; the Director of the Consular Service (Carr) to the Consul General at Large (Gottschalk), no. 96, Mar. 21, 1913, *ibid.* 12253/2a; the Assistant Secretary of State (Carr) to the consular agent at Ciudad Bolívar (Henderson), Oct. 16, 1924, *ibid.* 12532354/80

With reference to the possible appointment of an acting consular agent of the United States as an honorary vice consul of the Netherlands, the Department of State, in January 1939, said:

If the Agency is not closed and Mr. Nation should desire to accept appointment as Agent, he could not under the provision of Article I, Section 9 of the Constitution of the United States, accept appointment as a consular officer of another country. . . .

As a matter of policy the Department would not look with favor upon the continuance of Mr. Nation in the position of Acting Agent if he accepts appointment in any capacity as a representative of another country.

Assistant Secretary Messersmith to Consul General Brett, Jan. 9, 1939, MS. Department of State, file 12526384/73.

In reply to a report that an American consular agent in Canada had received appointment as justice of the peace, the Department of State, in October 1925, said that "inasmuch as the office to which Mr. Carter has been appointed is merely a local office it would appear that he may properly continue to function in his present dual capacity of American Consular Agent and Justice of the Peace".

Assistant Secretary Carr to Consul Woodward, Oct. 3, 1925, MS. Department of State, file 12526383/89.

With reference to a request from an American Consul in Syria that a dragoman at his Consulate be permitted to continue in that office following his appointment as Honorary Consul of Germany,

the Department expressed regret that it would be impossible to comply with the request.

Assistant Secretary Carr to Consul General Goold, Mar. 3, 1934, MS. Department of State, file 125.1833/349.

Regarding an inquiry as to whether a clerk in an American consular office could act temporarily as consul for a third country, the Department of State said:

While the Consular Regulations do not appear specifically to prohibit a non-commissioned employee of a Consular office from holding a position under a foreign government, the Department is of the opinion that it would be contrary to the spirit of the Regulations to consent to the proposed arrangement.

Assistant Secretary Carr to Consul General Lee, June 25, 1934, MS. Department of State, file 123 Steiner, B. Franklin/5.

In reply to an inquiry concerning appointment of American citizens as honorary consuls by foreign governments the Department of State in December 1934 said:

American
citizens as
consuls in
U.S.

An American citizen appointed as a consular representative of a foreign government may receive official recognition from the Government of the United States, provided he holds no office of profit or trust under the Government of the United States and no office under the state or local government. However, should it be brought to the Department's attention that a consular representative had come within the above prohibition as expressed in Article I, Section 9, Paragraph 8, of the Constitution, . . . after he had been formally recognized, the matter of his continued recognition would be given appropriate consideration.

The Chief Clerk and Administrative Assistant (MacEachran) to Dr J. L. Avellanal, Dec. 1, 1934, MS. Department of State, file 702.0011/138.

With reference to the expressed intention of the Bulgarian Government to appoint an American citizen as a consul general in the United States, the Department of State said that the appointment would be acceptable provided that he first resigned his commission as an officer in the United States Army Reserve Corps. The Under Secretary of State (Phillips) to the Bulgarian Chargé d'Affaires (Petroff), Aug. 15, 1934, MS. Department of State, file 702.7411/40.

In reply to an inquiry as to whether it was permissible for an individual holding a federal or municipal government appointment to accept appointment as honorary consul of a foreign government, the Department of State quoted article 1, section 9, clause 8, of the Constitution of the United States and said:

"You will observe that, under that provision of the Constitution, any person holding an office under the United States Government, shall not, without the consent of the Congress, accept any office from a foreign government.

"The regulation governing the acceptance of such office by an officeholder under a municipal government is a matter of the local law and consequently does not come within the jurisdiction of the Department, except insofar as the issuance of an exequatur may be concerned."

The Assistant Secretary of State (Carr) to Valdemar A. Miller, Mar. 12, 1935, MS. Department of State, file 702.0011/141.

RECOGNITION OF CONSULS

GRANTING OF RECOGNITION

§424

The performance of functions within the jurisdiction of a state by consular officers of another state is dependent upon arrangements, express or implied, between the two states for the sending and receiving of such officials. Provisions on the subject are not infrequently incorporated in treaties or conventions which *inter alia* prescribe in general or specific terms the duties to be performed and the rights, privileges, and immunities to be enjoyed. The authority of the consul to function as such is evidenced by a commission issued by his government and some form of recognition by the government of the state in which he is stationed. Recognition need not follow any prescribed form. It may be in the nature of a communication, written or oral, formal or informal, addressed by the foreign office to the local diplomatic representative of the consul's state or to the consul himself. The more usual practice is for the foreign office to issue to the consul a formal document generally referred to as an exequatur.

Typical provisions regarding the formalities incident to the appointment of consuls may be found in article 1 of the consular convention between the United States and France, concluded in 1853 (1 Treaties, etc. [Malloy, 1910] 528-529); article XVII of the treaty of friendship, commerce, and consular rights between the United States and Germany, concluded in 1923 (4 Treaties, etc. [Trenwith, 1938] 4191, 4198); and articles 2 to 7 of the convention between the United States and other American republics relating to consular agents, concluded at Habana in 1928 (*ibid.* 4738, 4739).

The Foreign Service Regulations of the United States, section II-9, January 1941, provide:

"(a) *Exequatur*. Upon the assignment of a consular officer, his commission shall be transmitted to the diplomatic representative accredited to the government within whose jurisdiction the consular office is situated, with instructions to apply for an exequatur. When obtained, the exequatur, together with the commission, shall be transmitted by the diplo-

matic representative to the consulate to which the officer is assigned through the supervisory consulate general, if there is one.

"If there is no diplomatic representative of the United States stationed in the country of assignment, the Department of State shall make other arrangements for procuring the exequatur.

"(b) *Provisional recognition.* Upon the receipt of telegraphic or written instructions from the Department of State, the diplomatic representative shall request the government to which he is accredited for provisional recognition for either principal or subordinate consular officers. . . . [Ex. Or. July 17, 1939.]

"NOTE 1. *Provisional recognition for temporary assignments.* Where a consular officer is assigned temporarily or where a vice consul is appointed to a post temporarily, the diplomatic representative accredited to the government within whose jurisdiction the office is situated is notified of the temporary arrangement and instructed to obtain provisional recognition. A commission will be issued covering such assignment or appointment, but an exequatur will not be requested. The commission shall be sent directly to the post at which the officer is stationed. Upon relinquishment of duties at his temporary post, the officer proceeds, unless otherwise directed, to his previous post where a new commission assigning or appointing him will be sent directly."

They also provide:

"II-10. *Entry on duties.* A consular officer may enter upon his official duties upon the receipt of his exequatur or, when directed by the Department of State, without an exequatur upon the receipt of provisional recognition from the proper authorities. (Ex. Or. No. 8210, July 17, 1939.)

"NOTE 1. *Entry upon duties where no document of recognition is issued.* In countries where no document is issued, an officer shall enter upon his duties when notice of his recognition is either published in the official gazette or otherwise made known in accordance with the custom of the country."

Article XVII of the treaty of friendship, commerce, and consular rights of 1928 between the United States and Latvia contains provision that each of the countries shall receive from the other consular officers who, after entering upon their duties, shall enjoy reciprocally all the rights, privileges, exemptions, and immunities enjoyed by officers of the same grade of the most-favored-nation; also, that the government of each country shall furnish exequaturs free of charge to such consular officers of the other "as present a regular commission signed by the chief executive of the appointing State and under its great seal"; and, further, that the respective governments shall issue—

to a subordinate or substitute consular officer duly appointed by an accepted superior consular officer with the approbation of his Government, or by any other competent officer of that Government, such documents as according to the laws of the respective countries shall be requisite for the exercise by the appointee of the consular function. On the exhibition of an exequatur, or other document issued in lieu thereof to such subordinate, such

Procedure

consular officer shall be permitted to enter upon his duties and to enjoy the rights, privileges and immunities granted by this Treaty. [4 Treaties, etc. (Trenwith, 1938) 4406.]

In December 1930 the Consul General of Latvia in charge of Legation informed the Secretary of State that "Mr. Vilibert Kalejs has been appointed Vice Consul to this Consulate General by the Minister of Foreign Affairs of Latvia" and that "Mr. Kalejs assumed his official duties on December 15, 1930." The Department replied that "formal recognition will be accorded him upon the receipt of his commission at the Department accompanied by a request for such recognition". With reference to a subsequent request that this officer receive exemption from the payment of a tax, the Department said that "The Consul General has not complied with the suggestions made by the Department in . . . [the above] note and Mr. Kalejs has not formally been recognized as Vice Consul." In subsequent correspondence the Department referred to "the claim of Mr. Vilibert Kalejs, provisionally recognized as Vice Consul of the Latvian Consulate General at New York", and in conclusion said that "In order for formal recognition to be accorded Mr. Kalejs it will be necessary for the Department to receive a request for such recognition accompanied by his commission."

The Consul General of Latvia in charge of Legation to Secretary Stimson, Dec. 18, 1930, and Mr. Stimson to the Consul General of Latvia in charge of Legation, Jan. 2, 1931, Mar. 26 and Apr. 14, 1932, MS. Department of State, file 702.60P11/76, /110, /114.

. . . it does not appear from the note of December 2 last, by which the Minister of Turkey applied for the issuance of an exequatur to you as Consul of Turkey at Washington, that your appointment in that capacity canceled the commission previously issued by the Turkish Government to Doctor Schoenfeld as its Consul General here. It appearing, therefore, that there are at this capital both a Consul General and a Consul of Turkey, it is, in the opinion of this Department, for the Turkish Minister to advise the Department of the jurisdiction and duties of each.

Consul Arslan to the Chief Clerk of the Department of State (Carr), Apr. 1, 1908, MS. Department of State, file 10255/5; Mr. Carr to Mr. Arslan, Apr. 6, 1908, *ibid.* 10255/4A.

Prerequisites The Italian Embassy in Washington, in August 1906, requested the usual recognition as a consular officer for a functionary described as "Voluntary Consular *Applicato*" in the Italian Consulate General in New York city. The Department replied that as any duty to be performed by him would be with the full consent of his superior officer, it was not necessary to issue a formal exequatur. The Italian

Ambassador then requested the Department to reconsider its decision, saying:

In view of the fact that the office which that Royal official holds forms an integral part of the consular service of His Majesty, I must observe that in the discharge of his duties Mr. Falkenburg is empowered by law to affix his own signature to no small number of the documents of the office to which he belongs and may be entrusted with missions pertaining to the capacity of consular officer like any of his ranking colleagues of the Royal Consulate.

Upon being assured by the Italian Embassy that, under the legislative and administrative rules of Italy, "a consular 'applicato' may eventually assume charge of a consular office under the circumstances contemplated in Article 7 of the Consular Convention of 1878 and is fully qualified to perform the acts referred to in Article 10 of the said Agreement, provided of course that the exigencies of the service so demand", the Department granted the recognition requested.

The Acting Secretary of State (Adee) to the Italian Chargé d'Affaires (Montagna), no. 395, Aug. 29, 1906, MS. Department of State, minor file, vol. 29; Ambassador Mayor des Planches to Secretary Root, no. 1235, May 15, 1907, *ibid.* file 6573; Mr. Adee to Mr. Montagna, no. 506, July 31, 1907, *ibid.* 6573/4-5; Mr. Montagna to Mr. Root, no. 2043, Aug. 2, 1907, and Mr. Adee to Mr. Montagna, Aug. 31, 1907, *ibid.* 6573/8.

In reply to an inquiry concerning the necessity of obtaining formal recognition of subordinate honorary consular officers of foreign countries in the United States, the Department of State, in November 1934, said that—

the Department desires all foreign consular officers serving in the United States, who transact business with Federal or State officials, or who sign, on behalf of their Governments, official documents which come before such officials, to be formally recognized. Such recognition is usually accorded upon the presentation of commissions or other documentary evidence of appointment issued by the competent authorities of the Government of the consular officers concerned. In the case of subordinate honorary consular officers of your Government to whom no commissions are issued, the Department is prepared to accept, in lieu thereof, certified copies of published governmental decrees, of Orders issued by the Minister of Foreign Affairs, or of instructions issued to the honorary consular representatives assigning them to duty at their respective posts, and will accord them formal recognition upon the receipt of requests therefor from you accompanied by such documentary evidence of their appointment as is described above.

Subordinate
officers

The Acting Secretary of State (Phillips) to the Acting Estonian Consul General in charge of Legation (Kuusik), Nov. 3, 1934, MS. Department of State, file 702.6011/49.

Exequatur
not covering
district

Discussions between the United States and Great Britain in 1934 concerning recognition of American consular officers assigned to districts which include territory within a British dominion, as well as other British territory outside of such dominion, resulted as follows:

It is now definitely understood that recognition will be accorded by the British Foreign Office to an American consular officer stationed in a Dominion in respect of any territory within his consular district, which is administered by His Majesty's Government in the United Kingdom. . . .

. . . In such cases, it is understood that while in the absence of a second commission no exequatur will be issued for such territory, nevertheless the necessary steps will be taken by the British Government to insure the recognition of the consular officer concerned for the representation of American interests in such territory.

Assistant Secretary Carr to Ambassador Bingham, no. 626, Dec. 4, 1934, MS. Department of State, file 122.352/118.

Canal Zone

By the provisions of this Article of the Treaty [art. III of the convention of November 18, 1903], the United States is granted, in the Canal Zone, all the rights, power, and authority of a sovereign, and the Republic of Panama is entirely excluded from the exercise of such rights, power, and authority. It would, therefore, seem clear that this Article confers ample authority upon the Government of the United States to grant exequaturs to foreign Consuls exercising consular functions in the Canal Zone.

The Secretary of State (Hughes) to the Chargé d'Affaires ad interim of Panama (Lefevre), July 20, 1921, MS. Department of State, file 702.0011F/3.

Trans-Jordan

In 1930 the American Consul General at Jerusalem was informed by the British High Commissioner that notice of the extension of his consular jurisdiction over Trans-Jordan had been received, that provisional recognition had been extended, that a formal exequatur would be issued by the Emir of Trans-Jordan, and that an official document indicating the Consul General's appointment was desired for the Emir. The Department notified the Consul General that his commission had been forwarded to the British High Commissioner for Palestine with this end in view and said further—

it is desired that you refrain from requesting the issue of an exequatur by the Emir Abdullah except under specific instructions from the Department.

Consul General Knabenshue to Secretary Stimson, no. 369, Dec. 19, 1930, MS. Department of State, file 123K722/242; Assistant Secretary Carr to Mr. Knabenshue, Feb. 16, 1931, *ibid.* 123K722/244.

EFFECT OF EXEQUATUR

§425

On the question as to the evidence which might properly be required by a court concerning the status of a person appearing and claiming the rights of a consul in probate proceedings, the Department of State expressed the view that—

a consul being an official accredited by the sovereign of one state to that of another is, upon being duly recognized by the sovereign of the receiving state, entitled to exercise all of the functions properly belonging to his office. Foreign consuls in the United States are accredited to the President. Before such consuls are recognized by this Government, this Department, acting for the President, must satisfy itself as to the right of their governments to appoint them, and as to the accuracy and validity of their commissions. When this Department satisfies itself as to the true representative character of any person designated by a foreign state as its consular officer in the United States, it issues to such officer an exequatur which is in effect evidence that the person therein referred to has been duly commissioned by a government having authority so to commission him to act in the capacity indicated by the exequatur. . . .

. . . it is suggested that the interests of the court, as well as those of all parties concerned, would be fully protected by a simple requirement of the production by any person assuming to act as the consular representative of a foreign country of satisfactory evidence of his having been recognized by this Department as entitled to the recognition requested.

The Acting Secretary of State (Lansing) to the Governor of Pennsylvania (Tener), Oct. 20, 1914, MS. Department of State, file 711.6521/89.

Following the revocation by the Department of State of the exequatur of a certain foreign consul he was subjected to criminal proceedings in the courts of New York. He contended that since his appointment as consul by his government had not been revoked he was protected against prosecution in the State court by section 256 of the Federal Judicial Code providing that the jurisdiction of the Federal courts in proceedings against consuls shall be exclusive. The Supreme Court of New York denied the contention on the ground that revocation of the exequatur was a final and conclusive determination and that "Consular status does not exist in the absence of the President's recognition of the person accredited by the foreign state." The decision was affirmed by the Appellate Division of the New York Supreme Court (1st Dept.), which also considered a letter from the Department of State with reference to the case stating that appellant's exequatur was canceled prior to the date of his indictment and that he was not on that date considered by the Depart-

ment to have been a consular officer within the meaning of section 256 of the Federal Judiciary Act.

Vladislav R. Savie v. The City of New York, 118 Misc. (Sup. Ct., N.Y. Cy., spec. term) 156, 158, 193 N.Y. Supp. 577, 579 (1922); affirmed, 203 App. Div. 81, 196 N.Y. Supp. 442 (1922). Secretary Hughes to George T. Campbell, Aug. 4, 1922, MS. Department of State, file 702.60h11/89.

. . . a consular officer should not perform consular functions at a post until he has obtained recognition from the local authorities or his exequatur or recognition from the Foreign Office through the American Embassy or Legation. When information is received by a consular office of the appointment of a new officer at that post steps should be taken at once to obtain local recognition. If local recognition cannot be obtained the consular office should take the matter up with the American Embassy or Legation and request that recognition be expedited as much as practicable.

In such a case as that at your post, of course, which is at the capital, the question either of temporary local recognition or delay in the receipt of an exequatur should be taken up with the American diplomatic office.

The Consul at Bucharest (Palmer) to the Secretary of State (Hughes), no. 217, Mar. 13, 1922, and the Director of the Consular Service (Carr) to Mr. Palmer, Oct. 11, 1922, MS. Department of State, file 122.35/19. To similar effect, see the Third Assistant Secretary of State (Wilson) to Consul Linard, no. 8, Nov. 6, 1907, *ibid.* 8793/1.

Not an
"officer"
of the U.S.

On May 19, 1909 the District Court of the United States for the Northern District of Illinois held that a consul of a foreign government was not an officer of the United States within the terms of the act of April 18, 1884 (23 Stat. 11), even though he was given the right to serve as consul by virtue of an exequatur issued by the executive department of the United States. The decision was in accord with the conclusion reached in an opinion of the Solicitor for the Department of State, prepared at the request of the United States attorney for the Northern District of Illinois, in which it was stated that—

assuming to act as a foreign consul without sufficient authority does not appear to come within the prima facie meaning of the statutory inhibition. In order to regard a foreign consular officer as "an officer . . . acting under the authority of the United States" it is necessary to incorporate by reference principles of international law not very clearly defined or entirely settled and invoke the practice of issuing exequaturs, which, to say the least, is reasonably consistent with the view that the

exequatur is merely a permission to the officer of a foreign government to exercise his authority in the United States.

United States Attorney Sims to Assistant Secretary Wilson, Nov. 20, 1909, MS. Department of State, file 15122/9; opinion of the Solicitor for the Department of State, Nov. 16, 1908, *ibid.* 15122/7.

Department is of the opinion that while you undoubtedly are a public officer of the United States, exercising a public office of the United States in Palestine with the approval of the Palestine authorities, the question whether you are a public official within meaning of the criminal laws of Palestine must be determined in accordance with those laws as interpreted by the competent authorities of Palestine, and the Department is not in a position to supplement your memorandum on that question.

The Acting Secretary of State (Castle) to the Consul General at Palestine (Knabenshue), telegram of Apr. 19, 1932, MS. Department of State, file 150.069 Mottes, Mordicia.

REVOCATION OF EXEQUATUR

§426

In 1906 the Department of State approved the refusal of the American Minister in the Dominican Republic to take any action in regard to the proposed protest of the consular body to the Dominican Government on account of the revocation of the exequatur of a Portuguese Consul for alleged interference in political affairs. The Department said that "The withdrawal of an exequatur is, like the granting of one, the sovereign prerogative, conditional on the consular representative being *persona grata*, and this Government recognizes, and, the proper case arising, exercises this right."

Minister Dawson to Secretary Root, no. 271, Aug. 1, 1906, and Acting Secretary Bacon to Mr. Dawson, no. 130, Aug. 21, 1906, MS. Department of State, file 102.

The Department of State, in a note of April 10, 1907, informed the Swedish Chargé d'Affaires ad interim of the revocation and annulment of the certificate of recognition issued to the Vice Consul of Sweden at St. Louis (who was an American citizen) because of a letter addressed by him to the President. After referring to article XIII of the treaty of commerce and navigation of July 4, 1827 between the United States and Sweden and Norway, 2 Treaties, etc. (Malloy, 1910) 1752, the Department added that, in view of the "impertinent and offensive character" of the letter sent by the Vice Consul, he had ceased to be *persona grata* in the office of Swedish Vice Consul. The Vice Consul was ordered by the Lega-

Offensive
conduct

tion to turn over the Vice Consulate to another person. Later, however, in view of certain explanations made by the Vice Consul and an apology written by him to the President, he was reinstated in the office, and recognition was again extended to him by the United States.

The Secretary of State (Root) to the Swedish Chargé d'Affaires (Ekengren), no. 407, Apr. 10, 1907, MS. Department of State, file 5665/1; Mr. Root to Minister de Lagercrantz, no. 9, June 5, 1907, *ibid.* 5665/11; Mr. de Lagercrantz to Mr. Root, July 27, 1907, *ibid.* 5665/22.

**Excessive
fees**

With reference to reports that a foreign consul in New York was charging fees not authorized by the law of his country for certifying invoices, the Department of State instructed the Minister to that country to inform the Foreign Office that if the practice was not discontinued it would be obliged to consider the question of revoking the consul's exequatur. It appearing that the consul was persisting in this practice, the Department, in April 1912, instructed the Minister to inform the Foreign Office that it had decided to withdraw the exequatur. The Minister then reported that the consul had been relieved of his functions.

The Minister in Haiti (Furniss) to the Secretary of State (Knox), no. 790, Dec. 21, 1910, and Mr. Knox to Mr. Furniss, no. 225, Jan. 17, 1911, MS. Department of State, file 638.1122; the Acting Secretary of State (Wilson) to Mr. Furniss, no. 323, Apr. 15, 1912, *ibid.* 702.3811/34b; Mr. Furniss to Mr. Knox, no. 1064, May 7, 1912, *ibid.* 702.3811/35.

**Inciting
desertion**

Shortly after the outbreak of the European War of 1914-18, a German national serving with the United States Army deserted. Referring to a letter from a German Consul found with his effects, the Department of State, in a note to the German Ambassador in the United States, said:

Inasmuch as it is stated in the letter from the Imperial Consul that, in effect, it would be the particular duty of Private Krueger, if it should become necessary, to free himself in any possible way, in order that he might obey the Consul's further command in the matter of departing to perform military service in Germany, it is a fair presumption that the desertion of this private from the United States Army was due to the Consul's persuasion. In any event, the Consul's course in openly inciting this soldier to desert from the army of a friendly nation, from which the Consul holds an exequatur, constitutes a serious offense. I have, therefore, the honor to request that you will take the necessary steps for the recall of this Consul.

The Acting Secretary of State (Lansing) to Count von Bernstorff, no. 1064, Oct. 9, 1914, MS. Department of State, file 702.6211/198.

In 1916 the Department of State was in possession of evidence tending to indicate that a foreign consular officer had in effect deported from the United States a person of his nationality and that he had refused to obey an order of a United States District Court to produce the individual. A note to the foreign diplomatic representative was prepared in the Department requesting the recall of the consul, but, before it was sent, the Department was advised that the consul had been recalled by his government.

Disregard
of court
order

Memoranda of the Office of the Solicitor for the Department of State, Oct. 5 and 30, 1916, MS. Department of State, file 702.9411/150; the Japanese Chargé d'Affaires (Tanaka) to the Secretary of State (Lansing), Sept. 9, 1916, *ibid.* 702.9411/152.

In 1921 the Department of State canceled the exequatur of a foreign consul in the United States upon the ground that he had made improper use of his official position by threatening to refuse passports and visas to persons patronizing steamship companies and other organizations advertising in a certain newspaper owned by an American citizen, and in other ways employing his position in a coercive manner to the detriment of American citizens.

The Secretary of State (Hughes) to the Yugoslav Chargé d'Affaires (Stanoyevitch), June 10, 1921, MS. Department of State, file 702.60h11/16; Mr. Stanoyevitch to Mr. Hughes, June 16, 1921, *ibid.* 702.60h11/48; Mr. Hughes to Mr. Stanoyevitch, June 27, 1921, *ibid.* 702.60h11/16; 1921 For. Rel., vol. II, pp. 949-953.

On July 26, 1908 the Government of Honduras canceled the exequaturs of the American Consul and Vice Consul at Ceiba, as well as those of the other consular representatives in that place. In a note of July 31 to the Honduran Minister the Department of State said:

... It is very unfortunate and in some regards most embarrassing ... that your Government should without customary diplomatic notification to this Government and without opportunity for interchange of views and temperate investigation of the facts, have taken so serious a step.

... If the American Consul and Vice Consul at Ceiba be shown to have done any act contrary to international precept, to the instructions of their Government or to the friendly and impartial purposes of the United States, a frank ascertainment of the facts and an equally frank comparison of the views of the two Governments, could hardly fail to result in a cordial agreement touching the course to be pursued for a friendly closure of the incident. Your Government, Mr. Minister, like mine, can expect nothing less than fair play in such a case—and it certainly can ask no more.

Under all the circumstances it is conceived to be due to the friendship existing between the two Governments that the cancellation of the American consular exequaturs be withdrawn, and that any complaint which the Government of Honduras may feel constrained to make concerning the course of those officers should take the appropriate diplomatic channel of investigation and amicable settlement.

In the absence of consular representation under the immediate direction of this Department, the protection of American life, property and interests at Ceiba and in its vicinity will be confided to the discretion of our naval commander in those waters pending the diplomatic disposition of the question unfortunately raised by the *ex parte* cancellation of the American Consular exequaturs.

In several notes written in reply, the Honduran Minister stated that the revocation of the exequaturs resulted from political activities of the consuls on behalf of revolutionists, that the Honduran Government declined to revoke its action, and that, upon the submission of proofs, the United States would be satisfied that the action of the Honduran Government was in accord with international law and justice. The Department of State reiterated that it merely asked for fair play and a just disposition of the incident by agreement of the two Governments meeting as equals and stated that it could accept no less than this and that the United States could not enter into any discussion which disregarded equality and treated the course of Honduras as irrevocable. The American Minister was instructed by the Department on August 19, 1908:

The careful investigation of the Commanding Officer of the *Marietta* and the agreement of all the evidence elicited by him as to the facts . . . are so far at variance with the report of the Commandante to the authorities at Tegucigalpa upon which the cancellation of the exequaturs was effected *ex parte* and without affording a hearing to the parties or to their government, as to present a case which it behooves the two governments to deal with in a spirit of impartial inquiry and with equal desire to see that right is done to all concerned. It is important that a door to a candid and just determination of the right, which has been so abruptly closed by the sole act of Honduras, should be reopened as befits the relations of two friendly and magnanimous nations.

With the approval of the Department of State, the matter was settled by the issuance of a decree by the Honduran Minister of Foreign Affairs stating that the Honduran Government "in the exercise of right which international law gives governments of withdrawing the exequaturs of consular officers, and in compliance with the law of Honduras, ordered that the exequaturs . . . should be revoked on account of their [the consuls'] intervention in the

political affairs of the country during the recent insurrection"; that the United States "although recognizing the right of the Government of Honduras to revoke exequaturs of consular officers for such a cause considers nevertheless that in view of the relations of especial friendship which exists between both Governments, an opportunity ought to have been given for a joint consideration of the matter on the basis of entire equality"; and that in as much as the action of Honduras was induced by the abnormal conditions then prevailing, and public order having been reestablished, the temporary revalidation of the exequaturs was decreed "while the Governments consider the affair in the spirit of cordial friendship existing between them".

Consul Linard to the Assistant Secretary of State, no. 60, July 26, 1908, MS. Department of State, file 7357/234-235; the Acting Secretary of State (Bacon) to the Honduran Minister (Ugarte), July 31, 1908, *ibid.* 7357/242A; Señor Ugarte to Mr. Bacon, Aug. 5, 1908, *ibid.* 7357/265; Acting Secretary Adeë to Minister Dodge, telegram of Aug. 14, 1908, *ibid.* 7357/310B; same to same, Aug. 19, 1908, *ibid.* 7357/291-292; Mr. Dodge to Secretary Root, telegram of Sept. 3, 1908, and Mr. Adeë to Mr. Dodge, telegram of Sept. 5, 1908, *ibid.* 7357/364; Mr. Dodge to Mr. Root, no. 51, Sept. 9, 1908, *ibid.* 7357/402-404. See also 1908 For. Rel. 456-470.

On July 18, 1922 the British Chargé d'Affaires in Washington informed the Department of State of the intention of his Government to withdraw the exequaturs of two American consular officers at Newcastle-on-Tyne on the ground that they had attempted to divert passenger traffic from British to American steamship lines by making difficulties over visas and hinting that inconvenience might be encountered unless passengers should travel by American lines. The Department of State replied to the Chargé d'Affaires:

In view of the fact that the British Government has seen fit to specify the reasons which have prompted its contemplated action in this matter, I have caused a careful investigation to be made of the alleged improper activities of these American Consular officers.

It was said that the report of the investigators, supported by affidavits, did not substantiate the allegations. It was suggested that, in as much as the British Government had by enumerating its complaints apparently invited an investigation, the contemplated action might be postponed until there had been an opportunity for the Department to examine the evidence upon which the charges were based and an opportunity had been afforded for the presentation of the views of the United States in the light of such evidence. Nevertheless the Chargé d'Affaires informed the Department, on August 28, 1922, that the officers' exequaturs had been canceled. As a result

of two investigations it was reported to the Department that the officers were not guilty of the charges, although the American Ambassador said "I find ample evidence, however, to show that these men as well as a number of their colleagues in the British Isles have interested themselves in active and open advocacy of the use of the United States Lines". On August 30, 1922 the Department of State instructed the Ambassador to take steps to close the Consulate at Newcastle. The Department informed the Ambassador on September 15 that the British Ambassador had requested that the Consulate be reopened and that the Department had replied that in as much as it had been suggested by the British Government that the alleged practice of these consuls was general throughout the American consular service it was considered imperative and necessary to ascertain exactly what these officers had been doing. Later, in response to the British suggestion that its charges against the American officers be dropped on the understanding that the Consulate would be reopened, the Department of State said:

... The Government of the United States has consistently maintained the position that the exequatur of Mr. Slater and the recognition of Mr. Brooks were withdrawn as the result of specific charges of wrong-doing and that, as the action of the British Government and the nature of the charges were made public, thus injuring the officers and imputing to the American foreign service practices never authorized, it was incumbent upon my Government to satisfy itself with regard to the facts. It therefore instituted an inquiry for the purpose of determining whether the charges had adequate basis. It has been desirous of completely establishing the guilt or innocence of the two officers and of disposing of the incident upon its merits.

The Department said, however, that it would agree to the suggestion if the British Government would agree to grant recognition to the two officers in question in their previous posts at Newcastle.

The British Foreign Office replied that instead of withdrawing the recognition of these officers at once, as was its undoubted right, it had postponed taking this action for a month in order to give the United States Government an opportunity to transfer them to other posts if it so desired. At the conclusion of this period, it was said, the British Government had no alternative but to exercise its sovereign right, as it was said the United States had done in 1856 in the case of British Consuls at New York, Philadelphia, and Cincinnati (IV Moore's Dig. 533-535), and the recognition of the officers was accordingly withdrawn. The note then said that the reasons underlying this action had been transmitted to the United States to facilitate its inquiry and to contribute to a clarification of the difficulty

and that the British Government still believed its action to have been founded upon accurate information. It was added:

Mr. Harvey's note appears, however, to have been written on the assumption that a legal case had to be made out against the officers in question before the recognition extended to either of them by His Majesty's Government could be properly withdrawn. Such an assumption is at variance with the well-established international practice in these matters and very distinctly at variance with the action of the United States in the precedents already mentioned above.

The Department, on February 12, 1923, authorized the Ambassador to reiterate to the British Foreign Office that a careful investigation had failed to sustain the charges and to say:

My Government desires me, furthermore, once again to point out that although it has never questioned the right of the British Government to cancel the exequatur of an American Consul on the ground that he is *persona non grata*, it considers that when specific charges are advanced it is compelled to make the most thorough investigation in order to clear or to discipline the alleged offender. My Government must, moreover, call in question the accuracy of the parallel which Your Lordship found in the cancellation in 1856 by the Government of the United States of the exequaturs of the British Consuls at New York, Philadelphia and Cincinnati. The evidence against these Consuls was developed in judicial proceedings which showed them to be guilty of violating the laws and the sovereign rights of the United States.

The Department of State, on March 9, 1923, released the above correspondence to the press and in so doing made the following statement:

The position of the Department in the present case is that, in its opinion, no illegal or improper conduct towards the laws or government of Great Britain has been committed and that the only evidence of guilt which the British Government has produced in support of its charges consisted of three unsigned statements which upon examination by the Department were not regarded as at all sufficient.

As a result of further negotiations the two Governments, on April 2, 1924, exchanged notes in which the British Government declared that it was prepared not to insist on the charges against the American officers and in which the United States declared its intention to reopen the Consulate at Newcastle. At the same time the British Government stated that it had no objection to the announcement of the United States that it agreed to the appointment of the two officers to posts in the British Empire.

The British Chargé d'Affaires (Chilton) to the Secretary of State (Hughes), no. 555, July 18, 1922, MS. Department of State, file 123S11/101; Mr. Hughes to Mr. Chilton, Aug. 11, 1922, *ibid.* 123S11/83; Mr. Chilton to the Acting Secretary of State (Phillips), no. 665, Aug. 28, 1922, *ibid.* 123-S11/87; Mr. Phillips to the Ambassador in Great Britain (Harvey), telegrams 268 and 291, Aug. 30 and Sept. 15, 1922, *ibid.* 125.655/3a, /10b; Mr. Harvey to Mr. Hughes, telegram 447, Oct. 6, 1922, *ibid.* 125.655/26; Mr. Hughes to Mr. Harvey, telegram 348, Nov. 8, 1922, *ibid.* 125.655/36; the Chargé d'Affaires in Great Britain (Wheeler) to Mr. Hughes (with enclosure), no. 1930, Jan. 2, 1923, *ibid.* 125.655/45; Mr. Hughes to Mr. Harvey, no. 812 and telegram 47, Feb. 12 and Mar. 9, 1923, *ibid.* 125.655/55a, /31; the Ambassador in Great Britain (Kellogg) to the British Foreign Office, Mar. 31, 1924, the British Foreign Office to Mr. Kellogg, Apr. 2, 1924, Mr. Kellogg to the British Foreign Office, Apr. 2, 1924, and the British Foreign Office to Mr. Kellogg, Apr. 2, 1924 (enclosures to despatch 257, Mr. Kellogg to Mr. Hughes, Apr. 3, 1924), *ibid.* 125.655/127. See also 1922 For. Rel., vol. II, pp. 392-406; 1923 For. Rel., vol. II, pp. 306-315; 1924 For. Rel., vol. II, pp. 249-252.

Closing of consulates

In February 1941 the Italian Ambassador to the United States informed the Department of State of the request of his Government that the Consulates at Palermo and Naples be moved to a place as far north as Rome and not on the seacoast. In a note dated March 5, 1941, the Department informed the Ambassador that —

Instructions to these offices of the American Government have been issued in accordance with this request and the supervisory consulate general of the United States in Italy is being established in Rome.

The Secretary of State avails himself of this opportunity to make request of the Italian Ambassador that all officials of his Government within the territory of the United States will confine their movements to those areas in which they exercise the recognized duties of their respective offices. This request does not include the personnel of the Italian Embassy in Washington whose names appear on the Diplomatic List. It would be appreciated, however, if the Italian Ambassador would keep the Department of State currently informed of the movements outside of Washington of the military and naval personnel attached to the Italian Embassy.

As regards the Italian consular offices at Newark, New Jersey, and Detroit, Michigan, the Italian Ambassador is informed that the American Ambassador in Rome has been requested to convey orally to the appropriate Italian authorities the desire of the United States Government that these offices should be closed and that the Italian personnel be withdrawn from these places. Should they remain within the jurisdiction of the United States the Department of State should be kept fully informed of their place of residence.

Memorandum of conversation between the Italian Ambassador (Colonna) and the Assistant Secretary of State (Long), Feb. 12, 1941, MS. Department of State, file 125.691/18; Secretary Hull to Mr. Colonna, Mar. 5, 1941,

ibid. 702.6511/1341a; Department of State, IV *Bulletin*, no. 89, p. 249 (Mar. 8, 1941).

In the note of the Secretary of State of Mar. 14, 1941 to the Ambassador it was said:

"The request of this Government would not, of course, preclude the Italian Ambassador calling to Washington Italian officials to confer with him as it is recognized that such would be part of his and their duties.

"Special couriers carrying official mail to and from Italian consular offices in the United States may proceed in the discharge of their duties provided their names as well as the offices between which they travel are communicated to the Department of State.

"The Department's request is not intended to include the wives, children and servants of Italian officials in the United States.

"The request of the Department of State applies to employees of the Embassy and Italian consular offices in the exercise of their duties regardless of nationality.

"It is anticipated that Italian officers shall obtain permission in case of need to leave the areas in which they exercise their duties in the same manner as prescribed with regard to the limitation imposed upon American consular officers in Italy by the Ministry of Foreign Affairs' note of February 11, 1941. This note states that the Ministry of Foreign Affairs will facilitate the trips to be made by the personnel of the missions or of consular officers which are notified to the Ministry of Foreign Affairs by the Chief of the diplomatic mission concerned. In other words, the Department of State will be glad to take into consideration any requests from the Italian Ambassador relating to such necessary trips."

Mr. Hull to Mr. Colonna, Mar. 14, 1941, MS. Department of State, file 702.6511/1353.

The note of Feb. 11, 1941 referred to above made certain explanations concerning areas in Italy closed as a war measure to travel by foreigners, including diplomats and consuls. The Italian Ministry of Foreign Affairs to the American Embassy at Rome, Feb. 11, 1941 (quoted in telegram 208 from the American Ambassador in Italy (Phillips) to Mr. Hull, Feb. 13, 1941, *ibid.* 702.0065/13).

In a note to the German Ambassador in the United States, dated June 16, 1941, the Department of State said:

It has come to the knowledge of this Government that agencies of the German Reich in this country, including German consular establishments, have been engaged in activities wholly outside the scope of their legitimate duties. These activities have been of an improper and unwarranted character. They render the continued presence in the United States of those agencies and consular establishments inimical to the welfare of this country.

I am directed by the President to request that the German Government remove from United States territory all German nationals in anywise connected with the German Library of Information in New York, the German Railway and Tourists Agencies, and the Trans-Ocean News Service, and that each of these organizations and their affiliates shall be promptly closed.

I am also directed to request that all German consular officers, agents, clerks, and employees thereof of German nationality

shall be removed from American territory and that the consular establishments likewise be promptly closed.

On June 19, 1941 the American Chargé d'Affaires in Germany was informed by the German Foreign Office that American consular officers in Germany and German-occupied territory had given cause for complaint and that a number of these authorities had been guilty of machinations injurious to the state and of maintaining an illicit information service and had thus acted in a manner incompatible with the duties incumbent upon them toward the country of which they were guests. The German Government, therefore, felt obliged, it was stated, to request that all American officers and employees of the consular establishments of the United States in Germany and German-occupied territory be withdrawn and that the consular establishments be closed. The request was also extended to the American Express Company and its employees. The Department of State on the following day instructed the Chargé to inform the German Foreign Office that the United States categorically rejected the allegations made against the American consular officers.

On June 19, 1941, the American Ambassador at Rome was in receipt of a note from the Italian Foreign Office stating that that Government had come to the conclusion that activities of the United States Consulates in Italy—

have gone and go in many instances far beyond the functions which are attributed and permitted to consular offices and are assuming a character especially in the field of information that is wholly illicit and in any case incompatible with the duties which are incumbent upon consuls towards the country in which they perform their function.

It was requested that American Consuls and Consulate employees be withdrawn from Italian territory. The Department, on June 20, 1941, instructed the Ambassador to inform the Italian Foreign Office that the United States rejected the allegations that American consular officers had been guilty of improper acts. At the same time it addressed a note to the Italian Ambassador in Washington, stating that in its opinion "it is obvious that the continued functioning of Italian consular establishments in territory of the United States would serve no desirable purpose"; and it was requested that all agencies in the United States connected with the Italian Government be closed and personnel withdrawn with the exception of duly accredited representation in Washington.

The Under Secretary of State (Welles) to the German Chargé d'Affaires ad Interim (Thomsen), June 16, 1941, Department of State, IV *Bulletin*, no. 104, p. 743 (June 21, 1941); the Chargé d'Affaires in Germany (Morris)

to the Secretary of State (Hull), telegram 2443, June 19, 1941, and Mr. Hull to Mr. Morris, telegram 1734, June 20, 1941, MS. Department of State, file 125.0062/299; the Ambassador in Italy (Phillips) to Mr. Hull, telegram 844, June 19, 1941, and Mr. Hull to Mr. Phillips, telegram 428, June 20, 1941, *ibid.* /200; Mr. Welles to the Italian Ambassador (Colonna), June 20, 1941, Department of State, IV *Bulletin*, no. 104, p. 742 (June 21, 1941).

In December 1914 the American Ambassador in Germany transmitted to the Department of State a *note verbale* received from the German Foreign Office stating that the German Government considered the exequaturs of foreign consular officers in areas occupied by the German Army to have expired. It was added that the German Government was disposed to consider favorably the wishes of its allies or of neutral countries respecting the establishment of consular officers in the districts in question, excepting those where actual military operations were in progress. It was also said that the granting of formal exequaturs in such cases was not deemed advisable and that such officers would simply be granted temporary recognition to enable them to act in their official capacity. The Department of State instructed the Ambassador to reply as follows:

Areas
under
military
occupation

The Government of the United States, in view of the fact that consular officers are commercial and not political representatives of a government and that permission for them to act within defined districts is dependent upon the authority which is in actual control of such districts irrespective of the question of legal right, and further, in view of the fact that the consular districts, to which reference is made in the Note Verbale of the Imperial Government, are within the territory now under German military occupation, is not inclined at this time to question the right of the Imperial Government to suspend the exequaturs of the consular officers of the United States within the districts which are occupied by the military forces of the German Empire and subject to its military jurisdiction.

Enclosure in despatch 308 from Ambassador Gerard to Secretary Bryan, Dec. 4, 1914, and Mr. Bryan to Mr. Gerard, telegram 1044, Jan. 21, 1915, MS. Department of State, file 125.0055/1; 1915 For. Rel. Supp. 916-923. An instruction to similar effect was sent to the Ambassador in Austria-Hungary (Penfield), telegram of Nov. 23, 1915, *ibid.* 125.1873/89. See also Mr. Gerard to Secretary Lansing, telegram 3995, June 14, 1916, and Acting Secretary Polk to Mr. Gerard, telegram 3183, July 12, 1916, *ibid.* 123So7/141; 1916 For. Rel. Supp. 795-796. For correspondence of the Belgian Government contesting the German position, and the German reply, see enclosure in despatch 425 from Mr. Gerard to Mr. Bryan, Jan. 11, 1915, MS. Department of State, file 125.0055/3; the Belgian Minister (Havenith) to Mr. Bryan (enclosures), Feb. 13, 1915, *ibid.* 125.0055/4. The above correspondence is published in: Department of State, *Diplomatic Correspondence With Belligerent Governments Relating to Neutral Rights and Duties* (European War, no. 3, 1916) 359-369.

UNRECOGNIZED GOVERNMENTS

§427

In a memorandum of the Office of the Solicitor for the Department of State dated December 3, 1909 concerning the status of consuls in countries with which the United States had severed diplomatic relations, it was concluded that—

if the United States and Nicaragua choose to allow their respective consular officers to remain at their posts in the territories of the other, they may do so unless circumstances are such that the consuls can not with safety remain. It seems to be advisable to retain them as long as they may serve a useful purpose. They are, however, to refrain from attempting to have official communications with the authorities. As to the performance of their consular duties, they may attend to such matters which do not involve the official recognition of the government, as may be necessary to enable the citizens of the respective countries to carry on their legitimate trade between the two countries.

MS. Department of State, file 6369/718.

In 1911, the United States not having recognized the annexation of the Congo by Belgium, the American Minister in Belgium reported to the Department that pursuant to instructions he had applied to the Foreign Office for the recognition of an American Vice and Deputy Consul General in the Congo and had received in reply a notice of formal recognition. The Department said:

De facto
authorities

In instructing you to apply to the Belgian Foreign Office for the recognition of Mr. Broy the Department was simply carrying out the rule and custom of asking consular recognition by the *de facto* authorities, it not being a question of *de jure* determination.

Minister Bryan to Secretary Knox, no. 115, Mar. 2, 1911, and Acting Secretary Wilson to Minister Bryan, no. 89, Mar. 22, 1911, MS. Department of State, file 125.2173/8. See also 1911 For. Rel. 13.

In 1912 an American Consul in Mexico reported to the Department of State that he had been informed by a rebel military commander that because of the non-recognition by the United States of the beligerency of his faction it would refuse to recognize American consular representatives and that the Consul should not address the military commander on behalf of his Government. The Department instructed the Ambassador in Mexico to address a note to the Mexican Government insisting that American citizens be accorded full rights by all parties to the insurrectionary disturbances. The De-

partment sent the same message to the Consul with instructions to present it to the military commander, together with specific representations on behalf of certain American citizens. He was also told to state informally that he was instructed by his Government to say that he must continue to exercise his functions and to make representations whenever occasion demanded since he was an American Consul charged with the protection of American citizens and interests in Mexico and holding an exequatur from the Mexican Government as representing the people of Mexico. The military commander agreed that he should continue to exercise consular functions.

Consul Letcher to Secretary Knox, telegram of Apr. 11, 1912, MS. Department of State, file 812.00/3576; Acting Secretary Wilson to Ambassador Wilson, telegram of Apr. 14, 1912, *ibid.* 812.00/3593a; Mr. Wilson to Mr. Letcher, telegram of Apr. 14, 1912, *ibid.* 812.00/3593c; Mr. Letcher to Mr. Knox, telegram of Apr. 17, 1912, *ibid.* 312.112F821/2. See also 1912 For. Rel. 781, 787-788, 792.

Following the revolution of 1918 in Russia and the disappearance of the regime recognized by the United States, American Consuls remained in that country for varying periods after the withdrawal of the American diplomatic mission. They were gradually withdrawn because of the impossibility of carrying on their functions. On February 22, 1923 the American Consul at Vladivostok reported to the Department of State that he and other foreign consuls in Vladivostok had been informed by the Vladivostok department of the Moscow Commissariat for Foreign Affairs that they would be allowed three months in which to obtain official exequaturs from the Commissariat for Foreign Affairs in Moscow and that, while their Consulates would be allowed to function in the meantime, they would not be regarded by the Soviet authorities as official. The Consul felt that he might be permitted to remain as a private individual but that it was unlikely that the Consulate would be permitted to function as in the past, even unofficially. The Department stated, in reply, that it would not make application for an exequatur and instructed the Consul to close the Consulate and leave Vladivostok in the event that his position there became untenable. It expressed the wish that the Consul prolong his stay as long as possible, consistent with dignity, and instructed him that if his departure became necessary he should make it clear that he was leaving not because of any unreadiness on his part to adjust himself to the local situation in a practical and friendly way as in the past but solely on the initiative of the *de facto* authorities. Within the ensuing month the Consul reported that he had protested to Soviet authorities concerning the expropriation of property belonging to an American company and that he had been told in reply that, pending his official recognition as consul by the

Moscow authorities, the secretary of the Moscow department of the Foreign Office refused to discuss any representations made on behalf of American interests. In subsequent communications, the Consul recommended that because of the impossibility either of protecting American interests or of promoting trade, the Consulate should be closed by May 1, 1923. The Department then instructed the Consul that on or about May 1 he should communicate informally with the local authorities and inform them that their attitude concerning his representations on behalf of an American company—

will now necessitate closing of office and departure unless local authorities are prepared to afford Consulate for the future the privileges and immunities essential to the conduct of consular business. The chief of these are, 1st, protection of the persons of the Consul and his staff; 2d, inviolability of Consulate and archives; 3d, freedom of communication with Consul's own government and its other official agencies abroad; 4th, intercourse with local authorities and right of interposition on behalf of American interests. Tuck [Consul] may say that Consulate will continue to function as long as these essential conditions are maintained and there is sufficient consular business to justify the maintenance of an office from the point of view of the United States. The question of obtaining an official exequatur from Moscow is involved in the larger question of the official recognition of the Moscow authorities by the United States and that Tuck may say he is not authorized to discuss.

The Department stated that if formal assurances in answer to the above were not received well before May 20 he should close the Consulate and depart. On May 1 he reported that he had communicated with the local authorities in accordance with instructions and that—

... Yesterday I received a call from the Secretary for Foreign Affairs who informed me that pending official recognition or some other form of mutual agreement between the Soviet Government and the United States, the Soviet authorities were not prepared to consider allowing the immunities and privileges requested. [Paraphrase.]

On May 22, 1923 the Consul reported from Tokyo that the Consulate at Vladivostok had been closed on May 15, 1923, in accordance with the Department's instruction of April 20.

The Consul at Vladivostok (Tuck) to the Secretary of State (Hughes), telegram 7, Feb. 22, 1923, and Mr. Hughes to the Chargé d'Affaires in Japan (Wilson), telegram 19, Mar. 2, 1923, MS Department of State, file 123T79/71; Mr. Tuck to Mr. Hughes, telegrams 11 and 12, Mar. 21 and 26, 1923, *ibid.* 361.1153In8/23, /24; same to same, no. 112, Mar. 27, 1923, *ibid.* 361.1153In8/27; Mr. Wilson to Mr. Hughes, telegram 40, *ibid.* 125-997/10; Mr. Hughes to Mr. Wilson, telegram 38, Apr. 20, 1923, *ibid.* 125.977/9;

Mr. Wilson to Mr. Hughes, telegram 48, May 3, 1923, *ibid.* 125.977/13; Mr. Tuck to Mr. Hughes, no. 140, May 22, 1923, *ibid.* 125.977/17. See also 1923 For. Rel., vol. II, pp. 792-797.

On March 5, 1919, at a time when diplomatic relations between the United States and Turkey were non-existent, the Department of State instructed a consular officer to proceed to Constantinople (Istanbul) for the purpose of reestablishing the Consulate General in that city. Instructions were also given concerning the assignment of other officers for duty in Turkey. The Department said:

. . . You and other consular officers are sent in a purely consular capacity without exequatur subject to permission to act being granted by the *de facto* authorities in control and with the express understanding that your resumption of duties with regard to American commerce should have no political significance or be regarded as a recognition of the rightfulness of control of such local authorities.

In a communication of November 13, 1920 to the American High Commissioner at Constantinople, the Department of State made it clear that officers in Turkey were not accredited to any local authority and were consular officers for the time being without exequaturs.

The Acting Secretary of State (Polk) to the Consul General at Nantes (Rayndal), telegram of Mar. 5, 1919, MS. Department of State, file 123R19/130a; Secretary Colby to High Commissioner Bristol, telegram 80, Nov. 13, 1920, *ibid.* file 123T79/23.

In 1920, prior to the recognition of the Turkish Government by the United States, the Department of State informed the American High Commissioner at Constantinople:

Department has no objection to the designation of consular officers as delegates of the High Commissioner. You will so instruct all consular officers in Turkey and inform them that they will retain their rank and pay as consular officers.

Secretary Colby to High Commissioner Bristol, telegram 22, Apr. 5, 1920, MS. Department of State, file 125.0067/84.

. . . while it has been the rule in the case of the non-recognition of a foreign government to make no new consular appointments to the country in question, or even assignments in the consular offices, in the Mexican case the long continued non-recognition of the Mexican Government made it necessary from time to time to replace some of the consular officers of the United States in Mexico and in these cases consular officers were merely detailed to posts already established and received no commission and of course no formal recognition of such officers was requested.

The duties performed by consular officers in a situation such as that indicated in Mexico would be of an informal nature so far as Mexican authorities were concerned and the extent to which such consular officers would be permitted to perform the usual duties would depend upon the courtesy of the local authorities.

The Solicitor for the Department of State (Hyde) to Joseph E. Agan, June 26, 1924, MS. Department of State, file 122.31/21.

With reference to the assignment of certain American consular officers as vice consuls in Chile at a time when the Government of that country was not recognized by the United States, the Department of State, on October 31, 1924, instructed the Embassy in Santiago that if the government of a country issued exequaturs which were formally and unconditionally accepted, such acceptance would have the effect of recognition of that government. The Chilean authorities were informed that the United States would be pleased to have the officers in question perform their functions in Chile, that it was recognized that this could only be done with the consent of the *de facto* authorities, and that the United States would be pleased to have its officers accept the exequaturs provided it were understood that such acceptance did not involve recognition of the existing regime. The Chilean authorities expressed willingness that the exequaturs should be issued with this understanding.

The Acting Secretary of State (Grew) to the Embassy in Chile, telegram 58, Oct. 31, 1924, MS. Department of State, file 122.352/11a; the Embassy in Chile to Secretary Hughes, telegram 88, Nov. 11, 1924, *ibid.* 122.352/12.

In reply to an inquiry as to whether American consular officials in Manchuria held exequaturs of either the Chinese or Japanese Governments, the Department of State, on November 15, 1935, said:

In reply to your three questions—the simple fact is that it has long been customary, the practice having its basis in treaty provisions, for a number of governments, including the American Government, merely to notify the Chinese Government that the assignment of a particular consular officer to a particular consular post has been made; and that practice continues to be followed.

The Chief of the Division of Far Eastern Affairs (Hornbeck) to Louis E. Frechtling, Nov. 15, 1935, MS. Department of State, file 125.0093 Manchuria/12. To similar effect, see the Acting Chief of the Division of Far Eastern Affairs (Ballantine) to A. H. Lovell, Jr., June 20, 1938, *ibid.* 125.0093 Manchuria/15.

In 1936 certain American Foreign Service officers were assigned as consuls in territory in Spain which was not under the control of the recognized Government of that country. Requests for the provisional

recognition of the consular assignments to posts in such territory were ignored by the Foreign Office, but the officers in question continued to serve at the posts to which they were assigned.

*The American Embassy in Spain to Secretary Hull, telegram X-557, Mar. 20, 1937, MS. Department of State, file 123 Goodman, Albert R./43; Mr. Hull to the Embassy in Spain, telegram 296, Mar. 25, 1937, *ibid.* 123 Goodman, Albert R./44. For record of the assignment of the officers, see *Register of the Department of State*, Oct. 1938, pp. 100, 101 (Albert R. Goodman, and George M. Graves).*

In February 1937 the Department of State instructed the Consul at Gibraltar to reopen the American Consulate at Málaga, Spain, at the time under the control of insurgent forces unrecognized by the United States. He was instructed to notify the local authorities of the reopening of the Consulate and of his assumption of charge but to do so orally and informally, in view of the fact that the United States had not recognized the insurgent regime.

Secretary Hull to the Consulate at Gibraltar, telegram of Feb. 19, 1937, MS. Department of State, file 125.565/24.

Following the alleged assumption by Germany in 1939 of a protectorate over part of Czechoslovakia, the German Foreign Office said in a note to the American Embassy—

the heads of foreign consulates to be established or already established in Prague require the exequatur of the Reich Government and must discontinue their consular functions if this exequatur is not applied for within six weeks.

The Department of State, on May 25, 1939, instructed the Embassy to state to the Foreign Office that a commission would be issued to an American officer at Prague as consul general and that it would be submitted formally to the Foreign Office together with an application for issuance of an exequatur. He was also instructed to inform the Foreign Office orally that this would not involve a change in the position of the Government of the United States as to the status of Czechoslovakia. On July 3, 1939 the Embassy transmitted the reply of the Foreign Office, stating in part:

In the opinion of the German Government the granting of the exequatur to a foreign consul for a given district is a formal act of sovereignty over that district. When one government addresses to another government a request that such an exequatur be granted, it must recognize that that other government is entitled to sovereignty over the area in question. It is an evident self-contradiction to ask a government to perform an act in exercise of its sovereignty and at the same time to contest the right of that government to exercise such sovereignty.

Since the request of the American Government for the granting of the exequatur involves this contradiction, the Foreign Office regrets that it cannot comply with it.

The Department then instructed the Ambassador to inform the Foreign Office that application was made for the exequatur in order that consular facilities in the vicinity of Prague might be continued and that it would be considered regrettable by the United States if it were forced to discontinue these functions at the instance of the German Government. An exequatur was not issued, but the Consulate was not closed until October 14, 1940.

The Counselor of Embassy (Kirk) to the Secretary of State (Hull), telegram 353, May 12, 1939, and Mr. Hull to Ambassador Wilson, telegram 193, May 25, 1939, MS. Department of State, file 125.733/31; Mr. Kirk to Mr. Hull, telegram 532, July 3, 1939, *ibid.* 125.733/38; Mr. Hull to Mr. Wilson, telegram 287, July 13, 1939, *ibid.* 125.733/39.

Following the occupation of Danzig by Germany in 1939, the American Embassy in Berlin, on December 31, transmitted to the Department of State a translation of a *note verbale* addressed to it by the German Foreign Office, reading as follows:

The Foreign Office has the honor to inform the Embassy of the United States of America that in view of the reunification of the Free City of Danzig with the German Reich brought about by the law of September 1, 1939, the exequatur issued to the consuls of the foreign powers in Danzig by the former Polish Government is no longer valid. The Government of the Reich can accordingly not recognize the consuls of foreign powers admitted under this exequatur in their consular capacities.

The Foreign Office requests the Embassy of the United States of America to be so good as to take steps either that the consular office of its government in Danzig should terminate its official activities by February 1, 1940, or that the exequatur of the Government of the Reich should be applied for, by that date, for the head of the consular office.

The Department of State instructed the Embassy, on January 3, 1940, to apply for an exequatur for an American Consul at Königsberg, East Prussia, and to indicate to the Consul at Danzig that the Consulate at Danzig would be closed.

The Counselor of Embassy (Kirk) to the Secretary of State (Hull), telegram 2496, Dec. 31, 1939, MS. Department of State, file 125.350/20; Mr. Hull to the Embassy in Berlin, telegram 17, Jan. 3, 1940, *ibid.* 125.981/83.

On December 31, 1939 the Embassy in Berlin transmitted to the Department of State a translation of a *note verbale* from the Foreign Office to the diplomatic missions in Berlin, reading as follows:

The Foreign Office has the honor to call the attention of the diplomatic missions in Berlin to the fact that in view of the altered legal position in the areas of the former Polish Republic the exequatur issued by the former Polish Government to the foreign consuls in the former Polish areas now under German administration is no longer valid. The government of the Reich is accordingly unable to recognize these former consuls in the official capacities which they have hitherto held.

On March 20, 1940 the Department of State said:

The Consulate General at Warsaw, Poland, has not been abolished but has ceased for the time being and until further notice to perform any consular functions or to transact any business. The Embassy at Berlin, Germany, will perform most of the functions formerly discharged by the Consulate General at Warsaw particularly with respect to the protection of American citizens in German-occupied Poland.

The Counselor of Embassy (Kirk) to the Secretary of State (Hull), telegram 2495, Dec. 31, 1939, MS. Department of State, file 125.981/82; Mr. Hull to Mr. Kirk, telegram 17, *ibid.* 125.981/83; Department of State mailing notice, Mar. 20, 1940, *ibid.* 125.981/102.

The presence in the United States of consular agents of the Mexican constitutionalist party, a revolutionary faction whose belligerency had not been recognized by the United States, was called to the attention of the Department of State. It was stated that these agents apparently intended to exercise functions such as the clearance of vessels. Inquiry was made as to whether, under the laws of the United States, such activities could be "allowed or tolerated". The Department replied that—

Consuls of
unrecognized
governments

the constitutionalist party in Mexico, to the reputed consular agents of which in the United States you referred, is in possession of some at least of the ports of Mexico, and, therefore, has the power to prescribe the conditions upon which foreign commerce can be carried on with these ports. Presumably one of the conditions imposed is that the formal documents of vessels coming to those ports from abroad must be certified to by a consular agent of the party in control of the ports, and apparently if such certification were prohibited in the United States, it would result in the discontinuance of commerce between this country and those ports of Mexico. It is not believed that the maritime nations of the world would consider such a result as desirable.

In January 1915 one of the agents above mentioned communicated with the Secretary of the Treasury suggesting the advisability of instructing customs officials to deal with him in all matters pertaining to the dispatch of vessels bound to Mexican ports under the control of the constitutionalist government, as that government would not recognize any other agent but its own. The Department of State suggested to the Secretary of the Treasury that it might be advisable to permit this agent to perform such official duties as might be necessary without regard to the final decision on the question as to who was the authorized consular representative of Mexico. The Treasury Department adopted the suggestion. The agent was informed that—

owing to the present disturbed condition of affairs in Mexico, no consular officers of that country are recognized in the United States. You will be permitted, however, to perform such of your official duties as are necessary in matters pertaining to the despatch of vessels bound for Mexican ports under the control of the so-called Constitutionalist party.

In September 1915 the Governor of Arizona informed the Department that a consul appointed by the constitutionalist government had presented his credentials. In reply to the Governor's request for advice the Department said:

No official recognition is accorded so-called consular representatives of any of the factions of Mexico in the United States. It may be advisable to permit Diaz Vizcarra to perform such of his official duties as are necessary in matters relating to the shipment of goods to Mexican ports in the hands of the Constitutionalist faction without regard to the final decision of the question as to whether he is the authorized consular representative of the Government of Mexico.

The Spanish Ambassador (Riaño), acting on behalf of Mexico, to the Secretary of State (Bryan), June 17, 1914, MS. Department of State, file 702.1211/421; Mr. Bryan to Señor Riaño, July 31, 1914, *ibid.* 702.1211/424; Señor Theodore Frezieres to the Secretary of the Treasury (McAdoo), Jan. 6, 1915, and Secretary Lansing to Secretary McAdoo, Feb. 6, 1915, *ibid.* 702.1211/444; the Assistant Secretary of the Treasury (Peters) to Mr. Lansing, Feb. 11, 1915, and Mr. Lansing to Señor Frezieres, Mar. 6, 1915, *ibid.* 702.1211/451; Governor Hunt to Mr. Lansing, telegram of Sept. 20, 1915, and the Acting Secretary of State (Polk) to Mr. Hunt, telegram of Sept. 21, 1915, *ibid.* 702.1211/467.

. . . this Department is in receipt of a communication from the local representative of the administration now functioning in Mexico stating that Mr. Sebastian Benavides has been appointed Consul at Albuquerque, New Mexico, and requesting the proper authorities be informed accordingly. As the United States Government has not recognized the present Mexican re-

gime, it does not grant the usual recognition to consular officers of Mexico appointed to reside in the United States. However, the Department considers that it is desirable as a practical matter for the agents of this government to raise no question as to the lack of formal recognition of Mr. Benavides, and to deal with him in the transaction of business. I, therefore, request that you will advise the appropriate officials of your Department to that effect.

The Secretary of State (Hughes) to the Secretary of the Treasury (Mellon), Apr. 18, 1921, MS. Department of State, file 702.1211/847a.

The act of June 15, 1917 provides in title VIII:

SEC. 3. Whoever, other than a diplomatic or consular officer or attaché, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

SEC. 4. The words "foreign government," as used in this Act . . . shall be deemed to include any Government, faction, or body of insurgents within a country with which the United States is at peace, which Government, faction, or body of insurgents may or may not have been recognized by the United States as a Government. [40 Stat. 226; 22 U. S. C. §§ 233, 235.]

In a note of December 1936 and in subsequent communications the Spanish Ambassador in the United States informed the Department of State that a certain individual in Puerto Rico had announced that he had been appointed the consular representative in Puerto Rico of the insurgent government of Spain, which was not at the time recognized by the United States. The Ambassador's communications were referred to the Department of Justice which brought the above provisions of law to the attention of the individual in question. It was subsequently reported to the Department of State that, as a result, he had ceased his activities as consul.

Ambassador de los Ríos to Secretary Hull, Dec. 21, 1936, Jan. 27, 1937, and Feb. 3, 1937, MS. Department of State, files 702.5211C/28, /33, /34; the Department of State to the Department of Justice, Feb. 9, 1937, *ibid.* 702.5211C/34; the Assistant Attorney General (McMahon) to Mr. Hull, Apr. 1, 1937, *ibid.* 702.5211C/42.

In connection with the institution in the courts of New York of a suit against the Mexican Government by an American company and the attachment, in connection therewith, of furniture, implements, and funds of the Mexican Consulate General and Financial

Agency in New York city, the Department of State informed the Governor of New York:

... As you are doubtless aware, this Government has not recognized the Central Administration in Mexico. Moreover, no exequatur has been granted to the person now acting as Mexican Consul General in New York. However, ... the Department has offered no objection to the performance by that person of the usual consular functions, and it clearly appears that the exercise of such functions is essential in many ways to the carrying on of commercial transactions between representatives of the two countries.

Under generally accepted practice and principles of comity a consul may claim inviolability for the archives and official property of his office and their exemption from seizure or examination, and Department is of opinion that under existing circumstances the person acting as Mexican Consul General in New York, even though he has received no exequatur, should in practice be accorded such inviolability.

Secretary Hughes to Governor Miller, telegram of Oct. 27, 1922, MS. Department of State, file 702.1211/1102; 1922 For. Rel. vol. II, pp. 709-710. For further details of this case, see vol. II, ch. VII, §175, pp. 472-474 of this Digest.

"As the United States Government has not recognized the present Mexican regime, it does not grant the usual recognition to consular officers of Mexico appointed to reside in the United States. However, the former incumbent having been either transferred or removed, the Department considers that it is desirable as a practical matter for agents of this Government to raise no question as to the lack of formal recognition of Mr. Lupian and to deal with him in the transaction of business as with his predecessor." The Third Assistant Secretary of State (Bliss) to the Secretary of the Treasury (Mellon), Mar. 2, 1923, and Secretary Hughes to the Governor of Illinois, Mar. 2, 1923, MS. Department of State, file 702.1211/1155.

In reply to an inquiry from the American Legation in Ecuador as to whether the United States Government would grant exequaturs to consular officers appointed by the Government of Ecuador, then unrecognized by the United States, the Department said that:

While Department can not issue exequaturs to consular officers holding commissions from an unrecognized regime it would be disposed at the request of the Ecuadoran Legation to permit Consular officers appointed by the authorities now functioning in Ecuador to carry on their duties provisionally without exequaturs.

Upon being informed, later in the same year, of the appointment of an Ecuadoran Consul at New Orleans the Department replied to the Ecuadoran Chargé that Federal and State authorities would be informed of the appointment and requested to raise no question as to the lack of his formal recognition.

The Chargé d'Affaires ad interim in Ecuador (De Lambert) to the Secretary of State (Kellogg), telegram 33, July 21, 1925, MS. Department of State, file 822.00/596; Mr. Kellogg to Mr. De Lambert, telegram 25, July 28, 1925, *ibid.* 702.2211/57; 1925 For. Rel., vol. II, p. 65; the Ecuadoran Chargé d'Affaires ad interim (Barberis) to Mr. Kellogg, Dec. 5, 1925, and the Assistant Secretary of State (Wright) to Señor Barberis, Jan. 25, 1926, MS. Department of State, file 702.2211/60.

In reply to an inquiry from an American steamship company as to transaction of business with consuls appointed by contending factions in Nicaragua, the Department of State, on October 26, 1926, said:

Only Nicaraguan consular officers holding exequaturs or granted provisional recognition by this Government are recognized as duly accredited consular officers. No consular officers appointed by the Nicaraguan Liberal faction have been so recognized. However, there will be no objection on the part of the Department if your company sees fit to pay to the representatives of the Liberal faction the fees for ships clearing for Nicaraguan ports occupied by the Liberal forces. The Department must leave it to interested American exporters or ship owners to determine for themselves what course they shall pursue.

Secretary Kellogg to the Panama Mail Steamship Company, telegram of Oct. 26, 1926, MS. Department of State, file 702.1711/191.

Replying to an inquiry from the acting city manager of Miami, Florida, as to consular officers appointed or assigned to that city by contending factions in Cuba, the Department said that an exequatur had been issued to a Cuban consular officer at Miami which had not been withdrawn or superseded. It was added that "as a practical matter exporters to Cuba may desire to deal regarding necessary shipping documents with person holding appointment from administration now functioning in Cuba which has not been recognized by United States."

Secretary Hull to Frank J. Kelly, telegram of Oct. 12, 1933, MS. Department of State, file 702.3711/711.

In 1937 an American consular officer in the territory of the insurgent government of Spain, not recognized by the United States, was told that that government was contemplating permitting him to return to his post on condition that the United States permit that government to accredit an ambassador to Washington. The Department replied:

We are not, of course, prepared to accept a representative of General Franco as an "ambassador" or "diplomatic agent". We feel that the continued presence of our consular officers in territory under the control of General Franco is so obviously in

the interest of all concerned that we assume no question will be raised about it.

Later Juan F. de Cárdenas, in a letter to the Secretary of State, said:

Referring to Section 233 of Title 22 of the United States Code, I have the honor to notify you hereby that I am acting in the United States as Agent for Generalissimo Franco and his Authorities.

The Secretary acknowledged the communication and said:

You will of course understand that your letter and this acknowledgment do not give you official status in the United States since this Government has not recognized the regime to which you refer.

In April 1938 the chief of the political section of the insurgent Spanish government informed an American Consul in Seville that American Consuls would continue to be permitted to function in the territory of that government but that it seemed desirable to conclude an arrangement by which agents and subagents of each government would be permitted to function in the territory of the other. The Department replied:

. . . With regard to the proposal that an exchange of agents be arranged, you should refer to the fact that this Government has taken no step which might be in any way construed as recognition of the Franco regime, and that there is no provision in our practice for the exchange of agents with a regime which has not been recognized. . . . Señor Juan Francisco de Cárdenas, former Spanish Ambassador in Washington, has notified us that he is "acting in the United States as Agent for Generalissimo Franco and his Authorities". Under the existing provisions of our laws he has been permitted to remain here in this unofficial capacity.

The Consul in May 1938 transmitted to the Department the following memorandum, which he had received from the insurgent government:

In fixing the functions of the agents of both countries, which shall have a reciprocal character, the desires of the Nationalist Government may be set forth by the following points:

1. Recognition of a de facto situation as shown by the existence of realities and necessities born of the relations between the two countries.

2. Recognition of the agent of the Generalissimo in New York, and those who may eventually be designated in other

cities in their faculties concerning the protection of persons and interests which fall within the scope of their authority:

- a) The issue and authorization of documents made out in their own offices, and the visaing of those issued by local authorities, official organs and private persons residing in the territory of the U.S.A.
- b) The issue and endorsement of passports.
- c) The authorization of notarial acts.
- d) Entries in the Civil Register.
- e) The clearance of ships of the Nationalist flag, and visaing of the documentation of foreigners bound for ports under the jurisdiction of the Nationalist Government.
- f) The receipt of payments applicable to Consular fees, and their remittance to Spain.
- g) The right to use official stationery, and the use of the official coat of arms on documents.
- h) Access to official centers.
- i) Liberty of secret postal and telegraphic communication with Spanish authorities and with the agents of the Generalissimo abroad.

3. Free access for Nationalist ships to ports of the United States of America, with the right to fly the red and gold flag adopted officially by the Nationalist Government, and permission for the agent of the Generalissimo to fly it at his residence as well as to exhibit there the official coat of arms.

On its part the Nationalist Government agrees to continue its extension to the Consuls of the United States of America in the liberated zone of the same faculties and prerogatives which they have enjoyed up to the present.

The Department instructed the Consul to present the following statement in reply:

Points 1 and 2, general. It would not be legally possible for this Government to accord to representatives of an unrecognized regime those consular rights and privileges which are now exercised, under existing treaty provisions, by the consular representatives in the United States of the Spanish Government with which this Government maintains diplomatic relations. As was stated in the Department's telegram no. 18, May 9, 6 p.m., this Government has taken no step which might be construed as recognition of the regime of General Franco.

Point 2 (a) While agents of General Franco cannot be permitted to perform consular functions in the United States or to issue consular documents as such, there is no restriction under our practice to the issuance or visaing by them of documents which are to be used in territory under the control of General Franco. (b) While this Government cannot recognize passports issued by agents of General Franco, in reality this presents no practical problem. Persons bearing such documents are being granted visas without being required to present any other

passport. In the cases of non-immigrants evidence of permission to enter a foreign country upon completion of their temporary stay in the United States would, of course, be required. There are no restrictions on issuance of travel documents for use in other countries by Franco agents acting in this country in an unofficial capacity. (c) Notarial services cannot be recognized in this country but there is no objection to services of this nature for use in Franco territory. (d) There is no objection to the recording of vital statistics for transmission to Franco authorities, but this Government can assume no responsibility in this connection. (e), (g), and Point 3. Since this Government does not recognize the regime of General Franco, it could not recognize the flag or official seal or paper of that regime. This Government could not, therefore, agree to permit the display of that flag or seal by a Franco agent on his residence, or enter into any undertaking with respect to the flying of that flag on vessels visiting American ports. There are no restrictions on the issuance of necessary documentation by Franco agents here to enable vessels in general to proceed to ports in Spain under his control. (f) Agents could not collect fees for consular services which they cannot be permitted to perform. No objection is perceived to collection of customary fees by them for services of the kind mentioned above not performed in a consular capacity. (h) This Government could undertake no obligation with respect to affording Franco agents access to official centers, nor could they be given any official status for this purpose. It is not believed, however, that they would have any difficulty in approaching the appropriate local officials in this country in a personal capacity. (i) There is no censorship of postal, cable, or telegraphic communications in this country.

In conclusion it may be observed that while there is no provision in our laws, regulations or practice for the recognition of agents of a regime not officially recognized by this Government, the unofficial representative of the Franco regime in this country can perform documentary services of the nature indicated above and has freedom of communication with the Franco authorities.

No practical reason is perceived, therefore, why our consular officers in territory under the control of General Franco should not be permitted to continue to function. The maintenance of our consular officers in Franco territory would seem to be in the mutual interest of all concerned.

The Consul reported in June 1938 that he had presented the above memorandum and had been told in reply that it did not concede the chief desire of the Nationalist Government, which was to obtain some kind of recognition for General Franco's agent in the United States.

Ambassador Bowers to Secretary Hull, telegram 398, Nov. 20, 1937, and Mr. Hull to Mr. Bowers, telegram B-384, Nov. 22, 1937, MS. Department of State, file 125.199/57; Señor Juan F. de Cárdenas to Mr. Hull,

Dec. 18, 1937, and Mr. Hull to Señor de Cárdenas, Dec. 27, 1937, *ibid.* 701.5211/555; Consul Bay to Mr. Hull, no. 222, Apr. 15, 1938, and Mr. Hull to Mr. Bay, telegram 18, May 9, 1938, *ibid.* 852.01/354; Mr. Bay to Mr. Hull (with enclosures), no. 250, May 22, 1938, and Mr. Hull to Mr. Bay, telegram 30, June 16, 1938, *ibid.* 852.01/374; Mr. Bay to Mr. Hull, telegram 38, June 27, 1938, *ibid.* 852.01/380.

PRIVILEGES AND IMMUNITIES

UNDER INTERNATIONAL LAW

§428

In reply to an inquiry concerning the status of an American consular agent in Venezuela under international law, the Department of State, in July 1915, said:

You will further inform Mr. Henderson that in the absence of treaty provisions between the United States and Venezuela defining the rights, privileges and immunities of consular officers, such officers would appear, under the generally accepted rules of international law, to be entitled only to those rights, privileges and immunities necessarily incident to the proper performance of their duties or supported by long established custom or the particular laws of the place, and that otherwise they are subject to the laws of the land precisely as other persons, irrespective of the question of their nationality.

The Secretary of State (Lansing) to the Minister in Venezuela (McGoodwin), no. 137, July 15, 1915, MS. Department of State, file 125.52584/33.

. . . Consular officers and their assistants are not considered to have a diplomatic status although, by reason of their office, they may have by law, treaty and usage, privileges not accorded to other aliens. . . .

The Assistant Secretary of State (Messersmith) to the French Chargé d'Affaires ad interim (Henry), Mar. 3, 1938, MS. Department of State, file 130 Goiran De Trans, Jean Roger.

. . . the rights, privileges and immunities enjoyed by foreign diplomatic and consular officers in the United States are based on principles of international law, treaty provisions and reciprocity, without discrimination, and therefore diplomatic and consular officers of Egypt enjoy in the United States all the rights, privileges and immunities mentioned on the same basis as like officers of other foreign governments.

The Department of State to the Egyptian Legation, Apr. 15, 1938, MS. Department of State, file 701/225.

Regarding an inquiry as to whether foreign consular officers in the United States were exempt from a statute making it a felony

for aliens to carry firearms, the Department of State refrained from answering the specific question, since its official action or decision was not required, but said that—

consular officers are not entitled to the immunities attaching to diplomatic representatives under international law, and unless otherwise provided by treaty consular officers may be said to be amenable to the laws of the place where they are stationed.

They are, of course, entitled to every reasonable facility and courtesy for the proper performance of their official duties as consular representatives of sovereign governments and in recognition of the desirability of avoiding unnecessary interference with the performance of their official duties treaties have been concluded exempting consular officers from some of the provisions of local laws. For example, the United States has concluded treaties with Germany . . . [and other countries] providing that consular officers of the contracting countries shall be exempt from arrest except when charged with the commission of offenses locally designated as crimes other than misdemeanors and subjecting the individual guilty thereof to punishment. . . . In addition to the treaties with the countries mentioned, the United States has concluded numerous treaties and conventions containing provisions relating to the rights and privileges of foreign consular officers in the United States.

The Solicitor for the Department of State (Hackworth) to James E. Davis, May 31, 1928, MS. Department of State, file 702/33.

Responding to an inquiry whether an American citizen acting as consul of a foreign country in the United States was entitled to the immunities accorded other consular officers, reference being made to article XV of the treaty of friendship, commerce, and consular rights of June 24, 1925 between the United States and Hungary, specifying that certain exemptions would be accorded by the respective countries to the consuls of the other who were nationals of the country appointing them, 4 Treaties, etc. (Trenwith, 1938) 4325, the Department said:

Nationality

. . . It is generally understood . . . that Consuls appointed by a country, who are not nationals of the appointing country, would be entitled only to the usual treatment accorded to Consuls whose country has no treaty with the United States providing for special rights respecting such officers.

The Chief of Police of Los Angeles (Davis) to the Secretary of State (Stimson), Oct. 31, 1929, and the Assistant Secretary of State (White) to Mr. Davis, Nov. 30, 1929, MS. Department of State, file 702.1411/181.

Residence or
domicil

An officer of this Government stationed and residing in a foreign country is usually considered as also having a legal residence at his former home in the United States or the place where

he intends eventually to make his home on the termination of his services abroad and his return to the United States.

The Director of the Consular Service (Carr) to Nohl and Nohl, Dec. 30, 1910, MS. Department of State, file 122.393/1.

. . . it is submitted that consular officers not domiciled in the United States are exempt from the payment of poll taxes. It is understood that the Vice Consul at Los Angeles is a citizen of Mexico, sent from his country as a consul "de carrière." When consuls are sent to a foreign country, their residence there does not effect a change of domicile. Hence, the domicile of the Mexican Vice Consul at Los Angeles is in Mexico and he appears not to be subject to a poll tax under the provisions of the Constitution and laws of the State of California.

The Assistant Secretary of State (Wilson) to the Governor of California (Johnson), Nov. 29, 1912, MS. Department of State, file 702.1211/381.

There appear to be no Federal statutes conferring upon American consular officers the right to a permanent domicile in the United States. In this connection it may be observed that the question as to whether a person has a legal right of domicile in a particular State of this country would, with the exception of certain cases cognizable in the Federal courts, appear to be one for determination in accordance with the laws and perhaps judicial decisions of the State in which the person may seek to establish a legal right of domicile.

The Chief of the Consular Bureau (Hengstler) to Consul Stiles, July 20, 1923, MS. Department of State, file 122.393/3.

" . . . For the purposes of the Department, the domicile of an American Foreign Service Officer in the United States is not changed by reason of the fact that he is stationed at a post in a foreign country." The Assistant Secretary of State (Carr) to J. A. Squiers, Mar. 30, 1936, MS. Department of State, file 123Sq42/34.

In connection with a legal proceeding in the French courts an inquiry was made of the Department of State in 1916 as to the legal residence of an American consular officer stationed in that country. The Department replied that, since the proceedings in question were in the courts of France, it appeared that the question of the legal residence of one of the parties would be for the determination of the courts of that country. H. C. Coxé to Secretary Lansing, Jan. 8, 1916, and the Second Assistant Secretary of State (Adee) to Mr. Coxé, Feb. 1, 1916, MS. Department of State, file 122.393/2.

UNDER TREATIES

§429

In an instruction to the Minister in Switzerland, discussing the interpretation of the most-favored-nation clause in article VII of the convention of friendship, commerce, and extradition of 1850 between **Most-favored-nation clause**

the United States and Switzerland (2 Treaties, etc. [Malloy, 1910] 1766), the Department of State said:

Prior to the negotiation of the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, signed on December 8, 1923, it was the general practice of this Government to regard the most-favored-nation clause in treaties to which it was a party as conditional [i. e. conditioned on reciprocity], regardless of whether the clause related to rights of consular officers or commercial matters. Beginning with the negotiation of the treaty of 1923 with Germany this Government adopted the unconditional form of the most-favored-nation clause as regards commercial matters but there was no change of policy with respect to the interpretation of the most-favored-nation clause as applied to the rights of consular officers.

In the absence of information as to the exact nature of the declaration which is said to have been made by the American Agent and as to what may have been the understanding between the negotiators of the two Governments regarding the right of consular officers to claim administration of the property falling to their absent nationals, the Department could not, in view of its long established policy of regarding the most-favored-nation clause concerning rights of consular officers as conditional, assume that in the negotiation of the Treaty with Switzerland of 1850 it was the intention of this Government that the most-favored-nation clause in Article VII should be regarded as unconditional in its application.

Under Secretary Castle to Minister Wilson, no. 1308, May 9, 1931, MS. Department of State, file 711.5421/24.

In 1925 an Italian consular officer in the United States requested refund of a duty said to have been collected on articles of clothing imported for members of his family. The request was based upon a most-favored-nation clause in article XVII of the consular convention of 1878 between the United States and Italy (1 Treaties, etc. [Malloy, 1910] 982), under which the Consul invoked article XXVII of the treaty of Dec. 8, 1923 between the United States and Germany (4 Treaties, etc. [Trenwith, 1938] 4202). The most-favored-nation clause contained in the consular convention of 1878 does not mention reciprocity. The Department of State informed the Treasury Department that it did not consider—

“that Italian Consuls are entitled under the most-favored-nation clause of the Convention between the United States and Italy to exemption from duty on articles imported for their personal or family use unless it be shown that like privileges are extended to American consuls in Italy.”

Reply to the same effect was made by the Department of State on Apr. 30, 1926 to an inquiry concerning the extension of the privileges of the German treaty to French consular officers under a most-favored-nation clause. The Under Secretary of State (Grew) to the Secretary of the Treasury (Mellon), Apr. 23, 1926, MS. Department of State, file 611.65241/44; the Assistant Secretary of the Treasury (Andrews) to the Secretary of State (Kellogg), May 4, 1926, *ibid.* 611.65241/46; Mr. Grew to Mr. Mellon, Apr. 30, 1926, *ibid.* 611.51241/74.

With reference to an inquiry from the Danish Legation, the Department of State, in a letter of Sept. 30, 1926 to the Treasury Department, expressed the view that Danish consular officers would be entitled to exemption from the payment of the Federal stamp tax on steamship tickets under a most-favored-nation provision only on condition that a like exemption would be accorded by Denmark to American consular officers. In the Treasury Department's reply it was said that under the most-favored-nation provision it appeared that Danish officers were entitled to the exemption. As a result of conversations between officers of the two Departments an understanding was reached that the requirement of reciprocity would prevail generally (see correspondence cited below under files 702.0611/349, /376), and in a note of Nov. 13, 1926 the Danish Minister was informed to this effect.

With reference to a letter from the Treasury Department, dated May 15, 1928, discussing the question of exemption of foreign consular officers from the stamp tax on steamship tickets, the Department of State, in a letter of Feb. 1, 1929 to the Treasury Department, said "this Department has interpreted the most-favored-nation clause in regard to consular privileges as conditional in treaties and conventions which this Government has concluded with other Governments". Reference was made to the above correspondence. The position was assented to by the Treasury Department in its reply of May 24, 1929.

The Secretary of State (Kellogg) to the Secretary of the Treasury (Mellon), Sept. 30, 1926, MS. Department of State, file 702.0611/225; Mr. Mellon to Mr. Kellogg, Oct. 26, 1926, and the Under Secretary of State (Grew) to the Danish Minister (Brum), Nov. 13, 1926, *ibid.* 702.0611/227; Mr. Mellon to Mr. Kellogg, May 15, 1928, *ibid.* 702.0611/328; the Under Secretary of State (Clark) to Mr. Mellon, Feb. 1, 1929, *ibid.* 702.0611/349; Mr. Mellon to Secretary Stimson, May 24, 1929, *ibid.* 702.0611/376.

The Spanish Embassy requested extension of free-entry privileges to Spanish Consuls under a most-favored-nation provision (art. XXVIII of the treaty of friendship and general relations of 1902 between the United States and Spain, 2 Treaties, etc. [Malloy, 1910] 1710) that the rights, immunities, and privileges of the respective consular officers shall be enjoyed reciprocally. The Department of State in Apr. 1927 said that—

"this Article is construed as requiring the reciprocal action of both Governments in the treatment of the consular officers of the other, in order to secure the full privileges which either Government may extend to the consular officers of another Government". Ambassador Padilla to Secretary Kellogg, Mar. 30, 1927, and Mr. Kellogg to Señor Padilla, Apr. 25, 1927, MS. Department of State, file 611.52241/21.

In July 1928 the Department of State sent the following instruction to the Minister in Latvia, interpreting the most-favored-nation clause in regard to customs privileges and exemptions of consuls in article XXVII of the treaty of friendship, commerce, and consular rights of 1928 between the United States and Latvia (4 Treaties, etc. [Trenwith, 1938] 4410) :

"... It is and has long been the policy of this Government to construe the most-favored-nation clause in respect of consular privileges and immunities and in particular in respect of fiscal concessions to consular officers as conditioned on reciprocity.

"The condition of reciprocity has been insisted upon by this Government in instances in which foreign Governments have relied upon a most-favored-nation provision to obtain in behalf of their consular officers in the United States the benefit of the particular privilege of free entry in the Treaty between the United States and Germany."

Secretary Kellogg to Minister Coleman, no. 539, July 10, 1928, MS. Department of State, file 711.60P2/37.

In response to a similar inquiry from the Government of Switzerland, based upon article VII of the convention of 1850 between the United States and Switzerland (2 Treaties, etc. [Malloy, 1910] 1766), providing that "Consuls and vice consuls . . . shall enjoy the same privileges and powers, in the discharge of their duties, as those of the most favored nations", the Department instructed the Minister in Switzerland to inform the Foreign Office that—

"this Department has consistently held that the most-favored-nation clause with respect to rights and privileges of consular officers does not embrace unconditionally specific rights and privileges which are granted on the basis of reciprocity to consular officers of third countries, but that the right to enjoy such specific rights and privileges is embraced in the most-favored-nation clause in the event that the country whose consular officers assert such rights or privileges thereunder accords in fact the same rights and privileges to American consular officers in their territories." The *Chargé d'Affaires* in Switzerland (Moffat) to the Secretary of State (Stimson), no. 1337, Mar. 5, 1930, and the Assistant Secretary of State (Castle) to the Minister in Switzerland (Wilson), no. 1239, Jan. 15, 1931, file 711.5421/17.

"The Secretary of State has the honor to inform the Minister that, in the absence of applicable treaty provisions or reciprocal agreements, foreign consular officers assigned to the United States do not enjoy the privilege of importing articles for their personal use free of duty subsequent to their latest arrival at their posts in the United States. Article II of the Consular Convention between the United States and Serbia, concluded on October 18 [1881] 1881, contains the following provision:

"The consuls general, consuls, vice consuls and consular agents of the two High Contracting Parties shall enjoy reciprocally, in the states of the other, all the privileges, exemptions and immunities that are enjoyed by officers of the same rank and quality of the most-favored-nation. . . ."

"The Department of State does not, however, consider that Yugoslav consular officers assigned to the United States are entitled under the most-favored-nation clause of the Convention to exemption from duty on articles imported for their personal or family use unless it be shown that a like privilege is extended to American consular officers in Yugoslavia. Upon receipt of information from the Yugoslav Legation that American consular officers assigned to Yugoslavia are accorded this privilege, the Department of State will take steps with a view to having such benefit extended to Yugoslav consular officers assigned to the United States, under the most-favored-nation clause of Article II of the Consular Convention concluded between the United States and Serbia in 1881."

The Department of State to the Yugoslav Legation, Nov. 7, 1930, MS. Department of State, file 611.60H241/26.

"The Department considers that the right of foreign consular officers to exercise functions in the United States under a most favored nation

clause does not embrace unconditionally the right to exercise any specific function which is granted on the basis of reciprocity to consular officers of third countries, but that the right to exercise any specific function is embraced in the most favored nation clause in the event that the country whose consular officers claim such right thereunder accords in fact the right to exercise the same function to American consular officers in its territories.

"The Department has received assurances from the Japanese Foreign Office which it considers as satisfying the condition of reciprocity in relation to the receipt of funds by Japanese consuls on behalf of their non-resident countrymen."

The Chairman of the Social Security Board (Altmeyer) to the Secretary of State (Hull), Feb. 17, 1939, and the Counselor of the Department of State (Moore) to Mr. Altmeyer, Mar. 24, 1939, MS. Department of State, file 711.9421/61. See also *ibid.* 711.6521/177.

An Italian national having died in New York leaving no heirs or next of kin, the Italian Consul General asserted that, by virtue of article XVII of the consular convention of 1878 between the United States and Italy (1 Treaties, etc. [Malloy, 1910] 982), he was entitled to receive the net assets of the estate for distribution to the Kingdom of Italy. The article provides that consular officers of the two countries "shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favoured nation". The Consul invoked article VI of the treaty of 1856 between the United States and Persia (2 Treaties, etc. [Malloy, 1910] 1373) providing:

In case of a citizen or subject of either of the contracting parties dying within the territories of the other, his effects shall be delivered up integrally to the family or partners in business of the deceased; and in case he has no relations or partners, his effects in either country shall be delivered up to the Consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country.

The Supreme Court of the United States, to which the case was appealed, in deciding in favor of the consular officer, said:

It may be assumed that Article XVII of the Consular Convention with Italy contemplates reciprocity with respect to the rights and privileges sought, and there is no suggestion that Italy has not recognized the right of consuls of the United States to take the effects of the citizens of the United States dying in Italy in circumstances similar to those in which the present claim of the Italian Consul General is pressed. As, in this view, there appears to be no ground for denying the right of the Italian Consul General to demand the application of the

last clause of Article VI of the Treaty with Persia, the only question is as to the interpretation of that provision.

Santovincenzo, Consul of the Kingdom of Italy at New York v. Egan, Public Administrator, et al., 284 U. S. 30, 36 (1931).

See also: *In re Wyman*, 191 Mass. 276, 77 N.E. 379 (1906); *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N.W. 300 (1912); *In re D'Adamo's Estate*, 212 N.Y. 214, 106 N.E. 81 (1914); Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916) §173; II Hyde, *International Law*, etc. (1922) 77 and n. 1.

As of possible interest, see *Singer v. United States*, and *United States v. Singer*, 83 F. (2d) 358, 360, 361 (C.C.A. 7th, 1936). See note in 108 A.L.R. 1448.

IN NEAR EASTERN COUNTRIES

§430

Prior to the coming into force, on August 13, 1924, of the convention between the United States and France, concerning rights in Syria and the Lebanon, and, on December 5, 1925, of the convention between the United States and Great Britain, defining the rights of nationals in Palestine, the United States exercised extraterritorial rights in those countries; and American consular officers were entitled to all the privileges and immunities that appertained to similar officers of other extraterritorial powers, including the right to exercise judicial functions. See vol. II, ch. VII, of this Digest. Article 5 of the mandate issued by the Council of the League of Nations with respect to Syria and the Lebanon states:

The privileges and immunities of foreigners, including the benefits of consular jurisdiction and protection as formerly enjoyed by Capitulation or usage in the Ottoman Empire, shall not be applicable in Syria and the Lebanon. Foreign consular tribunals shall, however, continue to perform their duties until the coming into force of the new legal organization provided for in Article 6.

The same article provides for the reestablishment of these privileges and immunities on the expiration of the mandate unless terminated or modified by agreement between the powers concerned. 4 *Treaties*, etc. (Trenwith, 1938) 4169, 4170-4171. Similar provisions are contained in article 8 of the mandate with respect to Palestine. *Ibid.* 4227, 4229. The provisions of these two mandates were incorporated verbatim in the above-mentioned conventions between the United States and France and the United States and Great Britain, respectively.

On August 11, 1924 the American Consul in charge at Beirut, Syria, transmitted to the Department of State a circular letter ad-

addressed by the French High Commissioner to the Consular Corps containing the following statement of the immunities and privileges to be extended to consular officers in Syria and the Lebanon:

1st. Inviolability of person and residence.

1st. Consuls cannot be the object of any coercive action with regard to acts accomplished by them in the exercise of their functions. Any fact of this kind can only occasion a diplomatic action.

2nd. For acts accomplished out of their functions, it is the custom that Consuls be not arrested, either to be submitted to an arrest for debt, or for an infraction other than a crime.

3rd. Under no pretence can the local authority enter the premises occupied by a consulate. On the contrary, the dwelling-house of a Consul or his business office, if he is a dealer, are not inviolable, and in no case can constitute a refuge or let those who inhabit it escape from justice.

2nd. Exemptions from certain personal and financial charges.

1st. Consuls are exempt from all personal charges which can be imposed by the local law upon foreign residents: military lodgings and requisitions, service in the national guards and police, functions of juryman, judge or assessors etc. . . . taking into account that these charges would trouble them in the exercise of their functions.

2nd. They are exempt, by right of international courtesy, from all financial charges, as direct taxes, custom-duties, municipal taxes and land-tax on buildings which contain the consulate's offices.

These stipulations cannot, however, bind the High Commission for the future. Consuls are, on the contrary, obliged to pay land-tax on buildings they privately possess, and if they are in business they are subject to the same charges as their nationals with regard to their trade.

3rd. Judicial Immunities.

Transitorily and unless contrary instructions from the Department have been received, Consuls cannot be indicted before local civil or commercial courts or judged by them in connection with the obligations they contract in the exercise of their functions. They, on the contrary, come under the jurisdiction of these tribunals for all engagements taken in their own name.

They can be summoned as witnesses either in civil or criminal cases.

4th. Persons who can take advantage of these immunities.

Consuls General, Consuls, Vice Consuls and other consular officers de carrière enjoy all these immunities. Foreign Consuls and consular agents who are not de carrière enjoy them in so far as it is necessary to secure the performance of their mission, i.e. they cannot be the object of any coercive action (1-1) or indicted before local courts with regard to acts accomplished during the exercise of their functions (III-I) and

the public forces or policemen cannot enter the premises occupied by a Consul except by virtue of an order emanating from the appropriate authority, and only in case of extreme urgency and for search or verification of a crime (1-3). But on the other hand, they can be arrested by the local authority or be subject to arrest for debt or for acts accomplished out of their functions, or be summoned as witnesses, and they are subject to the same personal and financial charges as their fellow-citizens.

Consuls are allowed, by measure of international courtesy, to keep exterior attributions of their functions, especially *ca-vasses*, but the latter, as *dragomans*, *purveyors*, *protégés*, etc. will not further enjoy any privilege and will be considered as other individuals.

A statement of the privileges and immunities of foreign consuls in Palestine was transmitted to the American Embassy by the British Foreign Office on May 27, 1931 together with an informal note in which they were said to "amount in practice to very little less than those enjoyed by foreign consular officers in Syria, though on paper they may seem more restricted". The variation was said to be "owing to the difference in the circumstances existing in Palestine and Syria".

The American Consul in charge at Beirut (Knabenshue) to the Secretary of State (Hughes) (with enclosures), no. 1548, Aug. 11, 1924, MS. Department of State, file 702/18; the Chief of the Division of Near Eastern Affairs (Shaw) to the Ambassador in Great Britain (Dawes), no. 285, Mar. 12, 1930, *ibid.* 702 Palestine/24a; the British Foreign Office to the American Chargé d'Affaires in Great Britain (Atherton) (with enclosure), May 27, 1931 (enclosed with despatch 1935 from Mr. Atherton to Secretary Stimson, May 29, 1931), *ibid.* 702 Palestine/31.

PROTECTION DUE CONSULAR OFFICERS

§431

A claim by Mexico against the United States arose in 1907 as a result of assaults by an American deputy constable on the person of a Mexican Consul at El Paso, Texas. The General Claims Commission, United States and Mexico, in passing upon the claim in 1927 discussed the matter of the protection due consular officers as follows:

The question has been raised whether consuls are entitled to a "special protection" for their persons. The answer depends upon the meaning given these two words. If they should indicate that, apart from prerogatives extended to consuls either by treaty or by unwritten law, the Government of their temporary residence is bound to grant them other prerogatives not enjoyed by common residents (be it citizens or aliens), the an-

swer is in the negative. But if "special protection" means that in executing the laws of the country, especially those concerning police and penal law, the Government should realize that foreign Governments are sensitive regarding the treatment accorded their representatives, and that therefore the Government of the consul's residence should exercise greater vigilance in respect to their security and safety, the answer as evidently shall be in the affirmative. . . . In this second sense President Fillmore of the United States, in his annual message of December 2, 1851, rightly said: "Ministers and consuls of foreign nations are the means and agents of communication between us and those nations, and it is of the utmost importance that while residing in the country they should feel a perfect security so long as they faithfully discharge their respective duties and are guilty of no violation of our laws. . . . Ambassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station." (VI Moore, *Digest* 813.) . . . In this second sense again it was rightly contended in 1925 by an American author that "if a consul is not a diplomatic agent, he is nevertheless entitled to a certain degree of protection because of his public character," similarly as commissioners employed for special international objects, such as the settlement of frontiers, supervision of the execution of a treaty, etc., "receive a special protection, even though it does not amount to diplomatic privilege." (Eagleton in *American Journal of International Law* 19, 1925, pp. 303, 308.)

In conclusion the Commission said:

. . . While recognizing that an amount should be added as satisfaction for indignity suffered, for lack of protection, and for denial of justice, as established heretofore, account should be taken of the fact that very high sums claimed or paid in order to uphold the consular dignity related either to circumstances in which the nation's honor was involved, or to consuls in backward countries where their position approaches that of the diplomat. The Permanent Court of Arbitration at The Hague in its award of May 22, 1909, in the case of the deserters at Casablanca twice mentioned "the prestige of the consular authority" or "the consular prestige," but especially with reference to conditions in Morocco as they were before France established its protectorate.

Taking all these considerations into account, it would seem that an award may properly be made in the amount of \$18,000 without interest.

Fred K. Nielsen, the American Commissioner, concurred as to the legal responsibility of the United States but said:

A consular officer occupies a position of dignity and honor, and there are several recorded precedents revealing emphatic action taken by Governments to obtain redress for indignities or physical

injuries inflicted upon consular officers in the countries of their residence. Diplomatic officers are accorded under international law certain privileges and immunities which do not extend to consular officers, and we find incorporated into domestic legislation provisions designed to carry out the obligations of international law with respect to matters of this kind. (See, for example, sections 4062 and 4064 of the Revised Statutes of the United States.) I think that international law undoubtedly secures to a consular officer the right to perform his functions without improper interference. And it would seem that, in a case in which his personal safety is threatened, authorities of the country of his residence may well be expected to take especial precaution to afford him protection. It is of course their duty to take proper steps for the protection of all aliens. But when indemnity is claimed before an international tribunal solely as personal compensation to a consular officer who has been injured, I do not believe that a sum so large that it must properly be regarded as punitive damages or as redress for indignity to a nation can properly be awarded on the ground that the injured person is such an official. . . . However, I do not intend to express the view that the fact that Mr. Mallén was a consul may not be taken into consideration in determining the amount of indemnity to which he is entitled for the injury inflicted on him.

Francisco Mallén (Mexico v. United States), docket 2935, *Opinions of the Commissioners* (1927) 254, 257-258, 264-265.

Upon being informed that the life of an American Consul in Mexico was threatened by members of a revolutionary faction, the Secretary of State sent the following message to the Secretary of War:

While it is not desired to send a military force across the line, except as a last resort, there would appear to be ample authority and precedent for doing so to prevent the killing of, or injury to, the consular representative of this nation whom the appropriate Mexican authorities are unable to protect.

I therefore have the honor to request that you will at once issue the necessary instructions to the officer at Eagle Pass to keep closely in communication with the Consul and to hold a force in readiness to go to his aid if the necessity arises.

The Secretary of State (Bryan) to the Secretary of War (Garrison), telegram of June 5, 1913, MS. Department of State, file 123E151/125.

In July 1924 the American Vice Consul at Teheran, Persia (Iran), was attacked and killed by a mob. On July 26, 1924 the Minister in Persia, acting under instructions from the Department of State, delivered a note to the Persian Prime Minister, reading in part as follows:

. . . The American consular representative in Teheran, accompanied by an American citizen, was brutally assaulted in the

streets of Teheran in broad daylight. In endeavoring to escape from their assailants, they entered a carriage and drove a considerable distance, when they were again assailed and the tragedy occurred. The American consular representative would appear to have had no reason to anticipate danger from visiting the particular place where he was the victim of the unjustified assault. It is most regrettable that it is necessary to add to this statement that the facts before my Government do not indicate that the police or military authorities made any adequate effort to protect the American consular representative, and there appears in fact to be evidence which it is believed the Persian Government will itself desire to investigate most vigorously that certain military elements participated in the assault.

My Government desires nothing which the facts of the case do not fully justify. It approaches the situation with no wish to offend a friendly government or to require punitive damages. It is, however, insistent that full reparation should be made, that punishment should be meted out to the guilty, that assurances be given and enforced of adequate protection for the lives of American citizens, and that the safety of its officials in Persia should be guaranteed.

After further setting forth the steps to be taken by the Persian Government in redress, the note stated :

The maintenance of relations between countries is primarily dependent upon the according of adequate protection to their respective nationals and to their official representatives. Diplomatic usage, treaty provisions, in fact the very provisions of the treaty between the United States and Persia of 1856, emphasize this view. This Government feels that the continuance of its diplomatic and consular representation in Persia will be dependent upon the action which the Persian Government may take in this case to vindicate this fundamental principle of international law and this foundation upon which international intercourse is predicated. It confidently awaits such action to supplement the steps already taken by the Persian Government. It can not over-emphasize the seriousness of the view which is taken of the present situation.

In a letter to the President, of January 5, 1926, the Secretary of State summarized the position taken by the United States and the steps taken by the Persian Government to comply therewith, as follows:

This Government's representations contained in its note of July 26, 1924, addressed to the Persian Government, included the following demands:

- (1) Indemnity for Vice Consul Imbrie's wife.
- (2) Payment of the expenses of dispatching the U.S.S. *Trenton* to Persia.

(3) Rendering of all suitable honors in connection with the return of the body of Vice Consul Imbrie.

(4) Adequate punishment of the guilty.

(5) Indemnity for Melvin Seymour, an American who was injured at the time of the killing of Vice Consul Imbrie.

The Persian Government, on July 29, 1924, agreed to these demands in full. It promptly paid the indemnity of \$60,000 which this Government demanded for Mrs. Imbrie. . . . The Persian Government also paid \$3,000 to Seymour for injuries he received at the time of the attack.

Furthermore, the Persian Government accorded all honors to the body of Vice Consul Imbrie, including a guard of honor headed by eight officers, one a general, while on Persian and Mesopotamian soil, rendered the first salute to the U.S.S. *Trenton* upon her arrival in a Persian port, and paid the expenses incident to the transportation to that port of Vice Consul Imbrie's body.

In order to carry out the fourth demand of this Government—namely, the adequate punishment of the guilty—the Persian Government, having proclaimed martial law, at once ordered the establishment of a special tribunal for the purposes of prosecuting and punishing the guilty. This tribunal, proceeding under Articles II and IV of the Law of Martial Government, on July 30, 1924, condemned to death three persons found guilty of direct responsibility for the death of Vice Consul Imbrie. The first of these, Morteza, was duly executed on October 2 and a month later the death sentences in the case of the other two, namely, Seyid Hossein and Ali Reshti, were carried out. The tribunal furthermore executed some 30 other sentences handed down in the cases of persons found guilty of varying degrees of participation in or responsibility for the aforementioned assault.

H. Rept. 985, 69th Cong., 1st sess.

In connection with an attack on an American consular officer in Italy, the Department of State instructed the Ambassador in Rome:

Please inform the Italian Government that this Government is highly appreciative of its prompt action in bringing Gowen's assailant to justice, of its expressions of concern and regret, and of its voluntary offer to reimburse Gowen for his medical expenses and other losses incident to attack.

This Government is thoroughly satisfied that the attack was made in ignorance of Gowen's identity and official character and is gratified that this unfortunate incident has been closed in such a prompt and satisfactory manner.

Secretary Kellogg to Ambassador Fletcher, telegram 73, June 23, 1925, MS. Department of State, file 123G741/43a.

With reference to an attack upon the Colombian Consul at Puerto Rico and threat of further attacks, and to a letter from the Governor

of Puerto Rico to the War Department concerning the Consul's request for protection, the Department of State said in a letter to the War Department:

. . . I beg to request that a further communication be sent to the Governor of Porto Rico inquiring whether, if it appears that either of the individuals who made the former attack upon the Colombian Consul at San Juan intends to make another attack upon him, such person may not be put under bond to keep the peace, or otherwise restrained. While it is true that consular officers have not the same status as diplomatic officers, they are nevertheless, because of their official position, entitled to special consideration, and a special obligation rests upon the Governments of the countries in which they are stationed to render adequate protection to them and to their offices and archives.

The War Department to the Department of State (with enclosures), Sept. 30, 1926, and the Secretary of State (Kellogg) to the Secretary of War (Davis), Oct. 12, 1926, MS. Department of State, file 702.2111/230.

In 1927 the American Consul at Puerto México, Mexico, was shot and seriously wounded after threats had been made against all American diplomatic and consular officers in Mexico. The warnings had been communicated to the Mexican Government and the local authorities with requests for protection. In discussing a claim based on the occurrence, the United States-Mexican General Claims Commission said:

Writers on international law have repeatedly stated that consular officers are entitled, to use the language of Phillimore, to "a more special protection of international law than uncommissioned individuals." *Commentaries upon International Law*, Vol. 2, 3rd ed., p. 270. See also Vattel, *Law of Nations*, Chitty's Edition, Chapter 6, Section 75; Oppenheim, *International Law*, Vol. I, 3rd ed., pp. 599-601. In a message sent to the Congress of the United States on December 2, 1851, President Fillmore, in referring to an attack on a Spanish Consular officer in New Orleans in 1851, interestingly mentioned the importance of consular officers in the relations of states, and observed that they as well as diplomatic officers "are objects of special respect and protection, each according to the rights belonging to his rank and station." Moore, *International Law Digest*, Vol. VI, p. 813.

Damages were awarded in the sum of \$15,000.

William E. Chapman (United States v. Mexico), docket 3400, Opinions of the Commissioners (1931) 121, 128-129.

In 1932 an American Consul in Manchuria was the victim of an apparently unprovoked assault by Japanese soldiers after he had identified himself. With reference to a report that Japanese au-

thorities in Manchuria hoped to settle the matter locally, the Department of State informed the American Ambassador in Japan that this would not be considered adequate and that it was felt that the Japanese Government should take appropriate action. It was subsequently reported from the American Legation in China that the Japanese Acting Consul General at Mukden had called on the American Consul General upon instructions from the Japanese Government, had expressed the regret of that Government, and had reported that the following steps were being taken: First, that the actual offenders had been dismissed and were to be court-martialed; second, the Japanese Major in command of the soldiers and his subordinates who were responsible, were to be disciplined; third, the Japanese Acting Consul General at Mukden and the Major were to call upon the American Consul General and express their regrets and apology; fourth, the Japanese Consul General and the military representative in Harbin were to express regrets and apology to the Consul who had been attacked. The Department instructed the Legation to express the gratification of the American Government and added—

. . . state that inasmuch as the object which it is sought to accomplish is to insure the proper protection of the persons and dignity of official representatives and others in such circumstances, the American Government feels that this object will amply be attained in the present instance by the adequate punishment of the persons who actually committed the assault; and that it would therefore be pleased if the disciplinary punishment proposed for Major General Ninamiya and his subordinate officers, who were not directly involved in the incident, should be remitted.

Minister Johnson to Secretary Stimson, telegram 11, Jan. 4, 1932, MS. Department of State, file 123C353/199; Mr. Stimson to Ambassador Forbes, telegram 2, Jan. 4, 1932, *ibid.* 123C353/205; Mr. Johnson to Mr. Stimson, telegram 47, Jan. 10, 1932, *ibid.* 123C353/227; Mr. Stimson to Mr. Johnson, telegram 9, Jan. 10, 1932, *ibid.* 123C353/228.

In 1933 the acting city manager of Miami, Florida, inquired of the Department of State as to what protection should be afforded the Consul of a former Cuban Government, with reference to threats by partisans of the administration then functioning in Cuba, which was not recognized by the United States, to oust him from office. The Department, after stating that the exequatur issued to this officer had neither been withdrawn nor superseded, said:

Article 4 of Consular Convention of 1926 between United States and Cuba provides that consular officers shall be entitled to the high consideration of the local authorities of the State

which receives them and it is considered that Dominguez should be protected by your city government from injury to his person or possessions and against any attempt to use force to oust him from office. Should any such attempt be apparently contemplated it is believed that city authorities should advise interested person that it will not be tolerated and suggest that he resort to the courts. Similar suggestion might also be made to Dominguez as a measure of relief against forcible aggression if feared.

Secretary Hull to Frank J. Kelly, telegram of Oct. 12, 1933, MS. Department of State, file 702.3711/711.

In 1933 the American Minister in Honduras reported to the Department of State that the prosecution in the local court of a person accused of attacking an American Consul had been dismissed. The Department instructed the Minister to inform the appropriate authorities that this decision seemed to threaten a miscarriage of justice and that it was desired that the Honduran Government investigate the case thoroughly to the end that the Appellate Court should have all available evidence. The Minister was also instructed that "In this relation you may refer to the obligation of countries under international law to protect consular officers." Subsequently the Court of Appeals revoked the decision of the lower court.

The Chargé d'Affaires ad interim (Higgins) to the Secretary of State (Hull), no. 970, Dec. 8, 1933, MS. Department of State, file 123 Stout, Kenneth S./108; the Acting Secretary of State (Phillips) to Mr. Higgins, telegram 32, Dec. 22, 1933, *ibid.* 123 Stout, Kenneth S./109; Minister Lay to Mr. Hull, no. 1026, Feb. 28, 1934, *ibid.* 123 Stout, Kenneth S./112.

In October 1936 the Mexican Ambassador in the United States complained that derogatory statements concerning Mexican consular officers had been made over various radio stations in Texas. The Department of State brought the matter to the attention of the Federal Communications Commission and said:

The Department feels very strongly about this and any other matter involving the broadcasting of attacks upon foreign diplomatic and consular officers in the United States and it hopes that it may be possible under existing law for your Commission to take some action with a view to effecting a discontinuance of broadcasts of this nature.

The Commission replied that it was prevented by law from exercising any power of censorship or interference with the right of free speech by means of radio communication but that in considering applications for renewal of licenses it could consider whether the station was serving public interest, convenience, or necessity.

The Mexican Ambassador (Nájera) to the Assistant Secretary of State (Welles), Oct. 31, 1936, and the Acting Secretary of State (Moore) to the

Chairman of the Federal Communications Commission (Prall), Nov. 13, 1936, MS. Department of State, file 702.1211/2660; Mr. Prall to Secretary Hull, Dec. 9, 1936 and Mr. Moore to the Mexican Chargé d'Affaires ad interim (Quintanilla), Dec. 17, 1936, *ibid.* 702.1211/2673.

PROTECTION OF OFFICE AND DWELLING

§432

The Foreign Service Regulations of the United States, section III-2, note 1, January 1941, provide:

NOTE 1. . . . The following immunities have been secured to consular officers in most countries either by reason of public law or by treaty with the country to which the officer is assigned:

(d) Inviolability of consular dwelling house and exemption from military billeting.

With reference to participation by an American Consul in the Dominican Republic in a protest of the Consular Body to the Government concerning the alleged violation of the Italian Consulate, the Department of State said:

Where a consular officer is a merchant and conducts his commercial business and his consular business in the same office, without separation, in the opinion of the Department, the placing of armed government forces upon the roof of the building, as a military measure, is not a violation of the rules of international law. It does not appear that the consular archives or property were disturbed. If the Italian Consular Agent deemed the act violative of any treaty provision between Italy and the Dominican Government, or of the rules of international intercourse, the case would seem to have been one for treatment between the Italian representative of [and] the Dominican Government rather than through the Consular Corps.

Consul Hathaway to Secretary Knox, no. 106, Nov. 15, 1912, and the Director of the Consular Service (Carr) to Mr. Hathaway, no. 54, Dec. 20, 1912, MS. Department of State, file 702.6539.

In March 1916 the Greek Legation in Washington informed the Department of State of an incident wherein the Greek Consul General in San Francisco had been subjected to treatment said to be in violation of the consular convention of 1902 between the United States and Greece. 1 Treaties, etc. (Malloy, 1910) 855. It appeared that local police officials had executed an order of a local court to levy on the goods of the consular officer pursuant to a judgment against him in private civil litigation and that, in so doing, they

went to the consular offices and used force in overcoming the resistance interposed by the Consul General to the seizure. The police authorities explained that they understood that the property seized was the private property of the Consul General, that the office in which the seizure was made was used for the private business of the Consul General, and that they had used no more than necessary force in effecting the seizure. An independent report obtained for the Department by the Department of Justice indicated that there was nothing to show that the office was used for any but consular purposes. In a letter of June 20, 1916 to the Governor of California, the Department, after pointing out that there was considerable discrepancy in the reports as to the degree of violence used by the local authorities, said:

... However, the Department, after consideration of the information in its possession . . . does not feel that it can escape the conclusion that the action of the local authorities constituted a deplorable violation of international law and of treaty stipulations relating to the inviolability of the Consul General's person and of the consular premises which are found in Article VI of the Treaty concluded December 2, 1902, between the United States and Greece which reads as follows:

"The consular offices shall at all times be inviolable. The local authorities shall not, under any pretext, invade them. In no case shall they examine or seize the papers there deposited. In no case shall those offices be used as places of asylum. When a consular officer is engaged in other business the papers relating to the consulate shall be kept separate."

I have, therefore, in behalf of this Government expressed to the Greek Chargé d'Affaires at this Capital sincere regret that any such occurrences should have taken place and have assured him that this Government greatly deplores that acts of physical violence should have been committed against the Consul General.

The Chargé d'Affaires ad interim of Greece (Vouros) to the Secretary of State (Lansing), Mar. 14, 1916, MS. Department of State, file 702.6811/59; the Governor of California (Johnson) to the Counselor of the Department of State (Polk), Apr. 3, 1916, *ibid.* 702.6811/64; the Attorney General of the United States (Gregory) to Mr. Lansing; May 31, 1916, *ibid.* 702.6811/70; Mr. Lansing to Mr. Vouros, June 9, 1916, *ibid.* 702.6811/70a; Mr. Lansing to Mr. Johnson, June 20, 1916, *ibid.* 702.6811/71b.

The Italian Embassy in Washington informed the Department of State, in April 1919, that the Italian consular agency in Birmingham, Alabama, had been searched for alcoholic liquors by police officers in violation of article VI of the consular convention of May 8, 1878. The article provides: "The consular offices shall be at all times inviolable.

The local authorities shall not be allowed to enter them under any pretext." 1 Treaties, etc. (Malloy, 1910) 979. The Department sent to the Embassy a letter received from the Governor of Alabama and, after expressing its regret that the incident had occurred, said:

. . . I feel, however, that you will agree that the facts brought out in the enclosure show that no disregard of treaty provision or affront to the Italian Government was intended by the State authorities. It appears that the search was instigated by a former Consul of the Royal Italian Government at Birmingham; that there was nothing on the premises at the time of the search to indicate that one of the rooms in the building was used as a consular office by the Acting Consular Agent of Italy; and that the building in which the consular office is situated is used as a laboratory and display room for a chemical company with which . . . the Acting Consular Agent, seems to be connected. It also appears probable that the consular office itself was used as a business office by the chemical company.

Article VI of the Consular Convention between the United States and Italy of May 8, 1878, would not seem to render inviolable any part of a building in which there is a Consular Agency except the part actually occupied by the Consular office. Moreover, it expressly provides that—

"when a consular officer is engaged in trade, professional business, or manufactures, the papers relating to the business of the Consulate must be kept separate".

The Chargé d'Affaires ad interim of Italy (Arone di Valentino) to the Secretary of State (Lansing), Apr. 14, 1919, MS. Department of State, file 702.6511/307; the Acting Secretary of State (Polk) to Governor Kilby, telegram of Apr. 15, 1919, *ibid.* 702.6511/305a; Mr. Kilby to Mr. Polk, May 2, 1919, and the Second Assistant Secretary of State (Adee) to Baron Arone di Valentino, May 10, 1919, *ibid.* 702.6511/310.

In 1921 the *huissier* of the Tribunal of First Instance at Brest, after unsuccessfully attempting to serve a civil process on an American Consul, left it at the Consulate. The purpose of the process was to charge the Consul as garnishee of certain funds which he held in his unofficial capacity on behalf of an American seaman. The matter was reported to the Department of State, which instructed the Consul as follows:

. . . The Department, while recognizing that the exact scope of the provisions of Article III of the Convention [of 1853 between the United States and France, 1 Treaties, etc. (Malloy, 1910) 530] that "The consular offices and dwellings shall be inviolable" and that "The local authorities shall not invade them under any pretext", is not clearly defined or indicated, is of the opinion that the action of the "huissier" in entering the Consulate in a peaceable manner and leaving the writ when the con-

sul refused to accept it, can hardly be considered a violation of the provisions of this Article.

The Second Assistant Secretary of State (Adee) to the Ambassador in France (Herrick), no. 625, Apr. 12, 1923, MS. Department of State, file 702.05/32.

To similar effect, see the Under Secretary of State (Grew) to Edgar J. Lauer, Dec. 12, 1925, *ibid.* 702.5111/229. *Contra: The Lonsdale Shop, Inc. v. Bibily et al.*, 213 N.Y. Supp. 170, 126 Misc. 445 (N.Y. Mun. Ct., 1925).

In an instruction of March 22, 1929 to a consular officer in Ireland, the Department of State said:

The Department refers to your despatch No. 192 of October 27, 1928, relative to the serving of process upon you at the Consulate in connection with the institution of legal proceedings against you as a result of an automobile accident and advises you that in its estimation, in the absence of a treaty a State is not believed to be deprived of the right of serving writs of process within the consular offices, provided suitable consideration is given to the official position of the consular officer.

As you are doubtless aware there are no treaty provisions in force between the United States and Great Britain having a specific bearing on the matter brought by you to the Department's attention. Moreover, the Department has taken the position that a treaty clause providing for the inviolability of consular premises does not necessarily preclude the serving of process upon consular officers in connection with suits brought against them in their private capacity.

The Under Secretary of State (Clark) to the Consul General in charge at Belfast, Ireland (Bowman), Mar. 22, 1929, MS. Department of State, file 123B68/146.

The Department of State was informed in May 1929 that the Government of Sweden had protested to the Government of Nicaragua as a result of the entrance of members of the Guardia Nacional of Nicaragua into the premises of the Swedish Vice Consulate at Bluefields for the purpose of making an arrest. There were two entrances to the building, one to the Vice Consul's office, the other to his dwelling. The entry of the soldiers was made through the latter. Their action appeared to be regular aside from the question of consular immunity. The American Legation was notified because the soldiers were under the command of an officer of the United States Marines. The Department, after stating that any reply to the protest would naturally have to come from the Nicaraguan Government, added:

Unless the inviolability of consular premises from entry by the police in cases of this kind is generally recognized in Nicaragua,

or provision therefor is contained in a treaty between Sweden and Nicaragua or in a treaty between Nicaragua and some other country the benefits of which are extended to Sweden through a most favored nation provision, it appears that no ground exists for protest.

Minister Eberhardt to Secretary Stimson, nos. 960 and 978, Apr. 24 May 3, 1929, and the Assistant Secretary of State (White) to the Chargé d'Affaires ad interim (Hanna), no 534, July 2, 1929, MS. Department of State, file 317.1721 Morazan, Hilda/1, /2, /5.

In July 1935 the French Consul at Manila informed the Governor General of the Philippine Islands that he had been made defendant in a civil suit in a matter involving rental of a house outside of Manila. The Consul claimed immunity under the consular convention between the United States and France of 1853, 1 Treaties, etc. (Malloy, 1910) 528. In reply, the Office of the Governor General referred to the case of Mr. Tourgée, the United States Consul at Bordeaux in 1898-99, wherein the house in question, although outside of Bordeaux, was sometimes used for consular work; wherein the French Government maintained that the inviolability of consular premises stipulated in the treaty did not extend beyond the offices and residences of consuls at their official posts; and wherein the United States, "while maintaining that this view was not consistent with the letter or the intent of the treaty, intimated that it would be adopted, should occasion arise, as a reciprocal construction thereof". V Moore's Digest 53, 54. The Governor General's Office concluded that "the immunity mentioned in the Consular Convention of 1853 does not extend beyond the offices and official residence of consuls". The Department of State approved this view.

The Secretary of War (Dern) to the Secretary of State (Hull) (with enclosures), Sept. 7, 1935, MS. Department of State, file 702.5111B/3; the Assistant Secretary of State (Moore) to the Acting Secretary of War (Woodring), Nov. 4, 1935, *ibid.* 702.5111B/4.

In September 1938 Japanese Naval officials demanded permission to erect a sign on the American consular premises at Chefoo, China, showing that control of the property had been taken over by the Japanese. The sign was erected without permission and later a similar demand was made to erect a stone marker on the premises. This demand was refused. In both cases, the Japanese authorities threatened eviction unless the permission were given. The Department of State instructed the Embassy in Tokyo to state to the Japanese Foreign Office that the threats were presumed to have been the irresponsible statement of a subordinate officer and that the erection of the sign was considered to be objectionable and lack-

ing in comity, and to request the issuance of instructions assuring the Consulate against further threats or interference. Subsequently the sign was removed and the matter settled locally.

Consul Roberts to Secretary Hull, telegrams of Sept. 11 and 15, 1938, MS. Department of State, files 125.2931/52, /53; Mr. Hull to the Ambassador in China (Johnson) (for Tokyo), telegram 327, Sept. 19, 1938, *ibid.* 125.2931/57A; the Ambassador in Japan (Grew) to Mr. Hull, no. 3362, Oct. 19, 1938, *ibid.* 125.2931/63.

In reply to an inquiry from the Alien Property Custodian, in 1918, as to whether there would be objection to his taking over property belonging to former consular representatives of enemy countries, or to their wives, the Department of State replied that—

. . . it would appear that the property mentioned in classes (3) [real estate held as an investment and not used for consular purposes] and (4) [stocks, bonds, mortgages, and other securities] may properly be taken over by your office, since the private investments of diplomatic or consular officers in the United States, or their wives, whether real or personal which could not be regarded as pertaining to them in their diplomatic or consular capacity, should not be exempt from local jurisdiction and should not enjoy diplomatic immunity which attaches to the official property or personal effects of a diplomatic or consular officer which are regarded as a means or instrumentality for exercising his official functions.

The property mentioned in class (2) [residences not used as consular offices], however, in so far as it might consist of the residence of the consul and his family when in the United States, and certainly the household goods mentioned in class (1), if used by the consul's family when here, ought not to be taken over in view of the attitude expressed by the German Government in April last at the time of the reported seizure of Ambassador Gerard's property in Germany, to the effect that the German Government was disposed to respect the property of American diplomatic and consular officers in Germany on the basis of reciprocity. It is the Department's view that a similar attitude ought to be adopted with respect to the property of the wives of former Austro-Hungarian consuls in this country. To take over the property mentioned in classes (1) and (2) would probably result in retaliatory measures being adopted by the enemy governments.

The Assistant Secretary of State (Phillips) to the Alien Property Custodian (Palmer), Oct. 16, 1918; 1918 For. Rel., Supp. 2, pp. 339-340.

PROTECTION OF ARCHIVES

§433

In December 1913 the Greek Chargé d'Affaires in Washington informed the Department of State that the Greek Orthodox Community of Philadelphia had brought an action in the District Court of the United States for the Eastern District of Pennsylvania against a Greek consular officer to compel him to deliver to a certain individual papers constituting his appointment by the Holy Synod of the Church of Greece as pastor of the community, which had been mailed by the Greek Ministry of Foreign Affairs to the Consulate. The Chargé d'Affaires stated that the court had issued a decree placing the Consul under an injunction to hold the papers in safekeeping until the further order of the court. He maintained that the suit, being an action bearing on the discharge of the Consul's official duties, was in the nature of an intervention by the local authorities in the Consul's relations with his Government, contrary to the provisions of the consular convention of 1902 (1 Treaties, etc. [Malloy, 1910] 855), and particularly article VI thereof expressly stipulating that the consular offices shall "at all times be inviolable", that the local authorities "shall not, under any pretext, invade them", and that "In no case shall they examine or seize the papers there deposited." The Department replied:

It appears primarily to be the duty of the Consul to present to the Court the means of defence which may be available to him under the Consular Convention between Greece and the United States; for until this is done it cannot be assumed by the Department that the Court will disregard the applicable provisions of this Convention.

In any event it is not competent for this Department, which, under our system of government, is a part of the executive branch of the United States Government, to attempt to control or influence the deliberations of a Federal Court, which is a part of the judicial branch of the Government.

However, the Department of State, on March 28, 1914, requested the Attorney General of the United States to instruct the appropriate United States attorney to represent to the court that the Department of State "is of the opinion that the Court's action in entertaining this suit against the Consul may be found to be in violation of the provision of Article VI of the Consular Convention of November 19, 1902, between the United States and Greece, as well as at variance with the principles of international law relative to the immunity of Consular archives (Moore's International Law Digest, Vol. V, p. 48 et seq.), and to suggest to the court the apparent advisability

of dissolving the injunction granted and of discontinuing the litigation in question". The action was taken.

The Chargé d'Affaires ad interim of Greece (Vouros) to the Secretary of State (Bryan), Dec. 17, 1913, and the Acting Secretary of State (Moore) to Mr. Vouros, Jan. 3, 1914, MS. Department of State, file 702.6811/40; Mr. Vouros to Mr. Bryan, Mar. 7, 1914, *ibid.* 702.6811/43; the Assistant Secretary of State (Osborne) to the Attorney General of the United States (McReynolds), Mar. 28, 1914, *ibid.* 702.6811/40; the Assistant Attorney General (Underwood) to Mr. Bryan, Apr. 1, 1914, *ibid.* 702.6811/44. See also 1914 For. Rel. 326-330.

In July 1920 the American Consul at Barbados, B.W.I., reported to the Department of State that an attempt had been made by local authorities to serve him with a process demanding the return of an affidavit which had been filed in the Consulate by a visa applicant. It appeared that this and subsequent efforts to serve the process led to altercations between the Consul and the local authorities and that the Governor, upon being informed of the incidents, advised the Consul that he was not a party to the proceedings and could afford him no relief. The Department thereupon instructed the Embassy in London:

You are instructed to bring these facts to the attention of the Foreign Office and state that this Government considers that the Petty Debt Court was in error in issuing a process which had for its object the return to the plaintiff of a document which had been voluntarily filed in the Consulate and which had become a part of the official records thereof. You will further state that this Government does not doubt that the British Government in this case as in others will recognize the inviolability of Consular Archives. . . .

You will further request that appropriate instructions be sent to the Colonial authorities of the Barbados, with a view of having the process or summons in this case quashed and such other action taken as may be proper under the circumstances.

The British Foreign Office expressed regret and stated that the matter would be taken up with the Secretary of State for the Colonies with a view to preventing any recurrence.

Consul Livingston to Secretary Colby, no. 338, July 14, 1920, and Assistant Secretary Adey to Ambassador Davis, no. 880, Aug. 18, 1920, MS. Department of State, file 125.165/2; the Counselor of Embassy (Wright) to Mr. Colby (with enclosure), no. 3510, Sept. 30, 1920, *ibid.* 125.165/4.

In 1923 an American Consul in Australia gave access to the consular records to accountants from the customs house who were investigating a claim against the Commonwealth Government for a sum of money alleged to have been deposited with the German Con-

sul General whose records had subsequently been turned over to the American consul. The Department instructed the Consul that—

it is the Department's opinion that no consular officer should permit the examination of his records in this manner. He should inform the inquirers that his records are confidential, but that if they will present their inquiry in writing he will himself make the investigation and inform them of the result.

The Chief of the Consular Bureau (Hengstler) to Consul Lawton, Mar. 12, 1924, MS. Department of State, file 199.3/266.

In 1924 the Court of King's Bench in Quebec reviewed on appeal the conviction and sentencing of an individual who, at the time of his arrest, was the Spanish Consul at Montreal, the charge being conspiracy with others to defraud the King by evading customs duties on imported goods. Before the preliminary inquiry the premises of the Consulate were searched at the instance of the prosecution under a search warrant, and a number of papers were seized for use in the prosecution. In discussing the legality of the action the court said, *obiter dictum*:

It is true that an ambassador of a foreign power is not subject to ordinary legal process, whether civil or criminal, as are the citizens and other residents of the country to which he is accredited and that his official residence is also inviolate. But the law does not recognize that a consul of a foreign power enjoys similar immunity. On the contrary, a consul, in respect of legal processes, occupies the same position as any other alien resident and in particular his official residence or domicile is not a sanctuary against the King's writ.

The court quoted the following passage from Hall's *International Law* (6th ed., by Atlay, 1909, p. 313):

These latter privileges appear to be reducible to inviolability of the archives and other papers in the Consulate.

With reference to this passage, it said:

"The archives" of course means the official documents and records of the consulate. I cannot explain what "other papers" may be, but if the author means all other papers that happen to be in the consulate, whether they relate to the consular service or not, he stands entirely unsupported. Anson, "The Law and Custom of the Constitution", speaks of this inviolability of the archives "and other official documents".

The court said, however, that even if the search were illegal the trial would not thereby be rendered void since the guilt of the defend-

ant was established without the aid of the documents and since this defense was specifically waived.

Maluquer v. Rea, XXXIII *Rapports Judiciaires de Québec, Cour du Banc du Roi* (1925) 1, 6, 7.

In September 1926 the American Consul at Martinique, Fr.W.I., was served with an attachment, the object of which was to prevent him from disposing, in accordance with regulations, of certain papers and documents in the Consulate belonging to an American vessel and forming part of the consular archives. The Department of State said:

. . . The Department is of the opinion that the action of the Martinique Court in attempting to prevent the Consul from disposing of the documents in question, violated the provisions of Article III of the Consular Convention of 1853 and furthermore, constituted an unwarranted interference with the exercise by the Consul of his official functions.

The French Foreign Office gave its assurance that the proceedings had been stopped as contrary to article III of the convention of 1853.

Consul Reineck to Secretary Kellogg, no. 57, Sept. 13, 1926, and the Under Secretary of State (Grew) to the Chargé d'Affaires ad interim (Whitehouse), no. 2054, Oct. 12, 1926, MS. Department of State, file 702.05/86; Mr. Whitehouse to Mr. Kellogg, no. 7630, June 20, 1927, *ibid.* 702.05/77.

The American Minister in Canada, in November 1928, inquired of the Department of State whether an American Vice Consul should comply in the event that he were served with a subpoena to produce in court the certificate of registry of an American vessel. The Department said:

While various treaties have provided expressly for the inviolability of consular offices and archives, and furthermore, while it appears that there is no express treaty provision in force between the United States and Great Britain regarding the matter, it is believed that they are entitled to the same immunity and protection even in the absence of an express treaty provision.

Absence
of treaty

. . . The American Consular Agent at Lunenburg, should decline to produce the Certificate . . . and in the event that he is served with a subpoena, he should report the matter at once to the Department.

Minister Phillips to Secretary Kellogg, no. 755, Nov. 27, 1928, MS. Department of State, file 702.05/102; Assistant Secretary Carr to Mr. Phillips, no. 421, Dec. 12, 1928, *ibid.* 702.05/103.

. . . . In general it may be stated that the rule has commended itself to universal acceptance that the archives and other official property of the Consulate are inviolable; that is to say, absolutely exempt from seizure or examination by the local authorities. This privilege belongs to the government which the foreign consul represents.

The inviolability of consular archives should undoubtedly exclude the competence of local courts to control the official actions of consuls in relation to official documents. Otherwise local courts would be in a position of controlling the official acts of consuls and interfering with the exercise of their discretion in performance of their official duties in connection with the handling of official documents.

The Acting Secretary of State (Castle) to the Minister to Norway (Philip), no. 45, July 15, 1931, MS. Department of State, file 702.05/137.

The Foreign Service Regulations of the United States, section III-2, note 1, Jan. 1941, provide:

"NOTE 1. . . . The following immunities have been secured to consular officers in most countries either by reason of public law or by treaty with the country to which the officer is assigned:

"(c) Inviolability of the archives and official property of his office from seizure or examination."

AMENABILITY TO LOCAL JURISDICTION

CIVIL PROCESS

§434

Unofficial
acts

In April 1909 the Department of State was asked to use its good offices in the collection of a debt alleged to be owing by a Swedish consular officer in the United States. The Department said that "inasmuch as a consular officer of Sweden is subject in this country to suit upon his private debts, the creditors cannot expect the Department to attempt to collect by diplomatic representation debts due from him".

The Assistant Secretary of State (Wilson) to Samuel L. Frooms, May 8, 1909, MS. Department of State, file 19319/1.

For a case involving a distinction between public and private status of consuls, see *Lyders v. Lund*, 32 F. (2d) 308 (N.D. Calif., 1929), and vol. II, ch. VII, § 175, p. 470, of this Digest.

In the absence of applicable treaties, foreign consular officers in the United States are not considered immune from civil suit. The Under Secretary of State (Grew) to Roger F. Hooper, Dec. 29, 1925, MS. Department of State, file 702.5911/344.

In 1909 an American Vice Consul General in Germany declined to accept service in a civil suit involving matters of private business, contending that as a consular officer of the United States he was exempt. The Department took the position that "consular officers in Germany are not exempt from civil process and . . . suit can be brought against them in unofficial matters in the courts of that country".

Under the treaty of 1871 between the United States and Germany unclassified vice consular officers were subject to the jurisdiction of the local courts, and the Vice Consul was instructed to submit himself to such jurisdiction.

The Director of the Consular Service (Carr) to Mrs. Mary H. de Crano, Dec. 22, 1909, MS. Department of State, file 20362/12; Count von Bernstorff to Secretary Knox, Mar. 4, 1910, and Mr. Knox to Count von Bernstorff, Apr. 13, 1910, *ibid.* 20362/20. See also 1910 For. Rel. 522-523.

In 1921 the American Consul at Brest discharged an American seaman on account of illness and received his wages, a part of which he held for safekeeping at the seaman's request. Subsequently the *huissier* of the Brest Tribunal of First Instance called at the Consulate and attempted to serve a process on the Consul, the purpose of which was to prevent him from returning this money to the seaman and to charge him as garnishee with a liability for a part of it, representing the amount in which the seaman was alleged to have been in default in certain business transactions. The Department gave the following instructions:

. . . The Department is of the opinion, however, that his [the Consul's] official duties ended when he discharged Perez and collected the wages due him, and although it does not object to his action in endeavoring to accommodate Perez by holding certain funds for him, it is of the opinion that in keeping these funds for Perez the Consul acted in his private rather than his official capacity.

It seems to be generally recognized that in the absence of express treaty stipulations consuls are not entitled to immunity from civil process with respect to acts not performed by them in their official capacity.

The Department is of the opinion that the "personal immunity" provided for in Article II of the Consular Convention with France of 1853 [1 Treaties, etc. (Malloy, 1910) 529] refers to freedom from personal arrest rather than to freedom from civil suit.

The Second Assistant Secretary of State (Adee) to the Ambassador in France (Herrick), no. 625, Apr. 12, 1923, MS. Department of State, file 702.05/32.

In 1925 injunction proceedings were pending in the courts of the United States to require the Spanish Consul General in New York to hold certain funds deposited at the Consulate General pending further order. The funds were being held by the Consul General in a fiduciary capacity for a private Spanish company, and the Consul General was involved in the suit in his fiduciary capacity as trustee of a private trust. The Secretary of State informed the Spanish Ambassador:

. . . I have been constrained to arrive at the conclusion that the pending proceeding involving, as it apparently does, questions of a private nature between the attorneys and the manufacturers of arms at Eibar, Spain, and having been brought in a Federal Court, which has jurisdiction over foreign consuls, appears to be a matter concerning which the Department would not be in a position to take any action.

Ambassador Riaño to Secretary Hughes, Feb. 14, 1925, and Mr. Hughes to Señor Riaño, Feb. 26, 1925, MS. Department of State, file 702.5211/230; Señor Riaño to Mr. Hughes, Mar. 2, 1925, and Secretary Kellogg to Señor Riaño, Mar. 17, 1925, *ibid.* 702.5211/231.

The Chancellor of the Panamanian Consulate General in New York applied to the Treasury Department in 1933 for a license to retain gold coin under an Executive order of August 28, 1933. The Treasury Department was of the opinion that the applicant was not entitled to exemption unless by virtue of his official status. The Department of State said that it was unable to approve the application, referring to article 17 of the Habana convention of February 20, 1928, relating to consular agents (4 Treaties, etc. [Trenwith, 1938] 4740) providing that "In respect to unofficial acts, consuls are subject, in civil as well as in criminal matters, to the jurisdiction of the state where they exercise their functions."

The Acting Secretary of the Treasury (Acheson) to the Secretary of State (Hull), Oct. 23, 1933, and the Assistant Secretary of State (Carr) to the Secretary of the Treasury (Morgenthau), Nov. 6, 1933, MS. Department of State, file 811.515/820.

Civil suit

This Department believes that the answer which the Governor General [of the Philippines] proposes to give, namely, that the question suggested is for the courts, is entirely appropriate. The Department is not in a position to say either that the Convention with France or the General principles of international law exempts a French consular officer from civil suit for indebtedness.

The Secretary of State (Root) to the Secretary of War (Taft), Apr. 3, 1908, MS. Department of State, file 12652.

In the absence of applicable treaty provisions exempting foreign consular officers from the application of garnishment laws, garnishment proceedings as affecting private or unofficial property in the possession of foreign consular officers would be regulated by the laws of the several states of this country. . . .

Garnishee
process

With reference to the official property of a foreign consulate as distinguished from personal or private property in the possession of a foreign consular officer, it may be stated that it is the understanding of the Secretary of State that under generally accepted practice and principles of comity a consul may claim inviolability for the archives and official property of his office and their exemption from seizure or examination.

The Department of State to the Czechoslovak Legation, May 17, 1926, MS. Department of State, file 702.05/63.

. . . there is no doubt that consular officers are subject generally to the jurisdiction of the local courts but the question here raised appears to be whether funds of this Government in the hands of a consular officer, due to a clerk in the Consulate, can be garnished by proceedings in the local court.

. . . this Government does not recognize the right of the Venezuelan courts to exercise control over moneys of this Government in your possession, due as salary to the clerk of the Consulate.

The Department of State to Consul Ray, no. 34, June 7, 1913, MS. Department of State, file 125.5813/15.

In 1925 the marshal of a local court left at the American Consulate at Valletta, Malta, a writ, addressed to several persons including the Consul, which had the object of attaching certain moneys believed to be held by the Consul for transmission to a person in Malta. The Consul had no such funds in his possession, and the matter was settled by a letter addressed to the Governor.

The Department of State instructed the Ambassador in London to bring the above facts to the attention of the British Foreign Office and to state that the United States was of the opinion that "consular officers should be exempted from the service of writs which have for their object the attachment of money or other property received by consular officers in their official capacity". In its reply, the British Foreign Office referred as follows to the reply made by the Governor of Malta to representations by the American Consul:

"It was, however, explained to Mr. Adams that while it was regretted that he should be subjected to the inconvenience of being served, in his official capacity, with judicial writs, there did not appear to be any remedy for the same as the local law does not provide for exemption in favour of foreign consuls in cases of the kind: on the other hand the courteous letter suggested by him would not have been sufficient because the object of the garnishee order being not merely that of obtaining information, but principally that of ensuring that money available in the garnishee's possession, and belonging or owing to the debtor, is duly stopped and attached, there would be no obligation on the receiver of the

courteous request 'for information' to withhold the money: indeed, if 'that money were claimed by the debtor (against whom the Order was issued) the Consul, or other person not served with the Order but to whom a mere request for information had been sent, would have no legal power or authority to detain it as he has when an Order from the Court is served upon him, and the Consul who refused to pay it at once, might be exposed to an action for damages."

The note of the Foreign Office went on to point out that—

"such constraint can never be exercised to the detriment of consular duties or consular affairs, for if the Consulate has in possession any money belonging or owing to the debtor, that money has already juridically passed out of the Consulate's power of disposal, because it already belongs actually to the debtor and is no longer consular money, even though materially still in its possession by chance, and therefore the constraint does not affect the Consul's duty of making it over to the debtor: . . . and the constraint reacts on . . . [the debtor] only, but it does not affect the Consul who is presumed to be a willing instrument of justice and of aid to the local authorities in dispensing such justice."

Consul Adams to Secretary Kellogg (with enclosures), no. 49, Apr. 25, 1925, and Under Secretary Grew to Ambassador Houghton, no. 48, June 8, 1925, MS. Department of State, file 125.567/3; the British Foreign Office to Mr. Houghton, Sept. 7, 1925 (enclosure in despatch 380 from the *Chargé d'Affaires ad interim* to Great Britain (Sterling) to Mr. Kellogg, Sept. 8, 1925), *ibid.* 125.567/5.

In Oct. 1924 the American Consul at Alexandria, Egypt, was served in the Consulate with a garnishment covering rent for the Consular premises. The Consul returned the garnishment to the President of the Mixed Tribunals at Alexandria, stating that he refused to accept or to be bound by it under any circumstances and requesting that he be assured that "such a violation . . . of the consular premises in an attempt to serve a garnishment upon a consular officer of the United States will not reoccur". The garnishment was accordingly withdrawn. The Department approved the Consul's action. Consul Ives to Secretary Hughes, no. 178, Oct. 23, 1924, and Assistant Secretary Harrison to Mr. Ives, Dec. 18, 1924, MS. Department of State, file 702.05/43.

In 1929 the American Consul General at Munich was served with a court order garnisheeing the salary of a clerk in his office. Upon complaint, the German Foreign Office stated that "in its opinion the attachment of the salary of an employee of the United States Consulate General in Munich would be tantamount to a claim against the American Government, and that garnishment cannot be issued against the latter as it is not under the jurisdiction of the German courts." The Ambassador in Germany (Schurman) to the Secretary of State (Stimson), no. 5189, Dec. 31, 1929, MS. Department of State, file 125.6353/167; the Ambassador in Germany (Sackett) to Mr. Stimson, no. 101, Mar. 22, 1930, *ibid.* 125.6353/169.

In 1912 a similar case had arisen in Berlin. The Consul General was informed by the German court that it was only because the debtor had been represented as being in the Consul's personal service that the garnishment had been permitted to issue. Consul General Thackara to

Secretary Knox, no. 693, Oct. 3, 1912, MS. Department of State, file 125.1953/41.

In 1931 the American Consul at Istanbul was served with an order by a local judicial body requiring him to withhold and pay over a portion of the salary of a consular clerk until an indebtedness of the clerk was extinguished. The Department of State instructed the Consul to inform the local bureau that the order could not be recognized, stating that its position was "based on the fact that, since the messenger is employed by this Government and not by the consul, the action of the Bureau is, in effect, an attempt to exercise jurisdiction over the Government of the United States by an Order directed to the American consul". Consul Allen to Secretary Stimson, telegram of Mar. 19, 1931, and Acting Secretary Carr to Mr. Allen, telegrams of Mar. 23 and Apr. 1, 1931, MS. Department of State, file 125.3353/305, /306.

In 1932 an Executive order was served on an American Consul General in Poland directing him to arrest the salary of an employee of the Consulate General for the purpose of satisfying a debt. When the matter was brought to the attention of the Polish Foreign Office by the American Embassy, it was informed that this procedure was not "a means of execution nor a constraint directed against the Consul General, but only towards the debtor who is at the same time employed at the Consulate General". Although the case was settled, the Department of State said:

"Dr. Gregg is not a personal employee of the Consul General but is an agent of the United States Government whose compensation is paid by this Government. Until paid, this sum remains the property of the United States and, as such, is not subject to the jurisdiction of Polish tribunals or the application of Polish laws." The Chargé d'Affaires ad interim in Poland (Flack) to the Secretary of State (Stimson), Apr. 6, 1932, and the Assistant Secretary of State (Carr) to Mr. Flack, no. 336, June 29, 1932, MS. Department of State, file 702.05/151.

In terminating the services of a consular employee, the American Consul General at Rome in May 1932 inquired whether he was to abide by Italian laws governing the discharge of employees. The Department said that—

Labor
laws

local laws or customs requiring the giving of advance notice or the payment of salary in lieu thereof cannot be held to be applicable to employees in a foreign diplomatic mission or consular office. The Department has decided to adopt without variance that policy and appropriate instructions are being issued to all diplomatic and consular officers.

On September 26, 1932 a circular instruction to this effect was issued, which, as incorporated in the Consular Regulations, read:

Foreign laws governing contracts of employment and employment benefits are not considered as applicable to the official employment by the United States of persons for service in American diplomatic missions and consular offices. Therefore, when engaging persons abroad as official employees of the United States, for service in such missions and consular offices, the attitude of the Department on this question should be made clear

to them in order that no question may arise if it should become necessary to terminate their services. The Department cannot undertake to give any assurance of advance notice of an intention to terminate the services of any officer or employee, American or foreign, nor can it authorize the payment of salaries in lieu of advance notice.

Consul General Jaeckel to Secretary Stimson, no. 805, May 20, 1932, and Assistant Secretary Carr to Mr. Jaeckel, Sept. 28, 1932, MS Department of State, file 125.7713/325; Mr. Carr to diplomatic and consular officers, Sept. 28, 1932, *ibid.* 122.21/303A; Consular Reg. U.S. sec. 24, n. 9, Oct. 1936. See For. Ser. Reg. U.S. I-6, n. 11, Jan. 1941.

With reference to a report from an American consular officer in Italy, in 1913, to the effect that it had become necessary to dismiss an employee in a Vice Consulate in Italy and that in consequence the Vice Consul had been cited by the dismissed employee for damages under Italian labor laws, the Department instructed the Embassy in Rome that the action of the Vice Consul was approved by the Department so that the suit was, in effect, against the Government of the United States. The Ambassador was instructed to bring the case to the attention of the Minister of Foreign Affairs and to inquire whether the Italian Government could properly bring the facts before the court to the end that the suit be dismissed. The matter came before the court and was dismissed on grounds of a technical defect in the complaint. Consul General Dunning to Secretary Bryan, telegram of May 21, 1913, and Mr. Bryan to Ambassador O'Brien, telegram of May 22, 1913, MS. Department of State, file 125.6153/29; Vice and Deputy Consul Broy to Mr. Bryan, July 17, 1913, *ibid.* 125.6153/45

A suit was brought against an American Consul in Italy by an Italian formerly employed in the Consulate by the United States Public Health Service in which damages were claimed as a result of his dismissal. The Department of State instructed the consul to—

"address written communication to court before whom case would be heard stating that this is in fact a suit against the United States and that you have been instructed by your Government that under generally accepted principles of international law sovereign states are immune from suits in the Courts of foreign states, and that this immunity naturally extends to state agents, acting in their official representative capacity."

The Consul subsequently reported that he had communicated with the court and that, while no reply had been received, he was informed that the suit had been dropped. Consul Nathan to Secretary Kellogg, no. 2354, Mar. 18, 1927, and Mr. Kellogg to Mr. Nathan, telegram of Apr. 21, 1927, MS. Department of State, file 123N19/221; Mr. Nathan to Mr. Kellogg, no. 2466, Aug. 8, 1927, *ibid.* 123N19/225. In Feb. 1928 the American Consul General at Naples reported that a suit brought against him by a discharged employee for damages under provisions of the Italian labor law had been decided in his favor in the First Civil Section of the Court of Naples (*Calvaruso v. Byington*). The basis of the decision was that the claimant was employed in a public capacity by the United States, that his relations with the Consul were based upon the public law of the United States, and that due respect for the sovereignty of a foreign state prevented the court from examining that law. Consul General Byington to Secretary Kellogg, no. 7855, Feb. 23, 1928, *ibid.* 123B99/182. In 1931 a similar decision was rendered by the Court and Penal Tribunal of Naples in a suit brought

against the American Consulate General by a discharged employee (*Mazzucchi v. Dreyfus*). The decision was affirmed by the Royal Court of Appeals of Naples which, in the course of its opinion, said:

"Consuls do not possess the precise status entitling them to represent their Government in international political relations and do not form part of the diplomatic corps. However, in fulfilling their missions and in the exercise of the duties with which they are charged, they must be considered as accredited officials of the Government which nominates them. Consequently, if Consuls enter into relations with private individuals to perform functions which pertain to the political activity of the State which they represent, then every action relative to such relations is without the jurisdiction of this Court, inasmuch as a foreign State, in the exercise of its political powers cannot be subordinate to the authority of another State without the destruction of the concept of its sovereignty" [translation furnished by Consulate General]. Consul General Dreyfus to Secretary Stimson (with enclosure), no. 860, Feb. 3, 1931, MS. Department of State, file 123D82/215; Consul General DuBois to Mr. Stimson, no. 167, Dec. 23, 1931, *ibid.* 123D82/266.

With reference to a suit brought against an American Consul in Rome in 1932 under Italian labor laws, the Department instructed the Consul General:

"You are requested to ask the Embassy to bring to the attention of the Ministry for Foreign Affairs the decision in the case of Salvatore Mazzucchi against the Consulate of the United States in the person of the Consul, Mr. Louis Dreyfus, decided on September 25, 1931, by the Special Session of the Labor Magistrate's Office attached to the Court of Appeals of Naples. It should be suggested to the Ministry for Foreign Affairs that it request the appropriate legal officer of the Italian Government to bring to the attention of the Italian court in which suit has been instituted against Mr. Boucher the nature of the suit and the reasons why it should be dismissed."

The Consul General subsequently reported that the matter had been dropped. Consul General Jaeckel to Secretary Stimson, no. 943, Oct. 18, 1932, and Assistant Secretary Carr to Mr. Jaeckel, Jan. 16, 1933, MS. Department of State, file 125.7713/350; Mr. Jaeckel to Mr. Stimson, no. 1041, Feb. 4, 1933, *ibid.* 125.7713/358.

With reference to the closing of three United States Consulates in Mexico in 1929, the Department of State in each case instructed the Consul to give the notice and pay the three months' salary to the discharged employees, as required by Mexican labor law. Consul Flexer to Secretary Kellogg, telegram of Feb. 8, 1929, and Mr. Kellogg to Mr. Flexer, telegram of Feb. 9, 1929, MS. Department of State, file 125.393/14; Secretary Stimson to Vice Consul Taylor, telegram of Sept. 21, 1929, *ibid.* 125.123/26; Assistant Secretary Carr to Mr. Taylor, Oct. 10, 1929, *ibid.* 125.123/28a; Mr. Carr to Vice Consul Blocker, Dec. 12, 1929, *ibid.* 125.577/22.

In reply to an inquiry from an American Consul in Mexico concerning the application of these laws to an employee whom he was instructed to discharge, the Department in June 1932 said that, while it considered such laws to relate entirely to employment contracts of a private nature and not to official employment by another government in its Embassy or Consulate for the conduct of its official business, he might nevertheless pay the discharged employee the three months' compensation required by the law. Consul Shaw to Secretary Stimson, telegram of June 18, 1932, and Mr. Stimson to Mr. Shaw, telegram of June 30, 1932, MS. Department of State, file 125.8353/133.

In 1932 an American Consul in Mexico reported to the Department that the claim of a discharged employee before the Central Board of Conciliation and Arbitration of the State for compensation under these laws had been decided in favor of the Consulate on the ground that the defendant was a representative of a foreign government, that the claimant was a public employee in the service of that government, and that the board consequently was without jurisdiction and did not consider that the Federal labor law was applicable. The additional three months' salary was not paid. Consul Nathan to Secretary Stimson, nos. 185 and 199, July 1 and 28, 1932, and Acting Secretary White to Mr. Nathan, telegram of Aug. 22, 1932, MS. Department of State, file 125.6233/271 and /273.

An American Consul in Colombia reported to the Department in Aug. 1935 that he was being sued by a former employee under the local employees law and that he was contesting the jurisdiction of the court under article 5 of the consular convention of 1850 between New Granada and the United States which provides that "Consuls, in all that exclusively concerns the exercise of their functions, shall be independent of the State in whose territory they reside". 1 Treaties, etc. (Malloy, 1910) 317. The Department instructed the Legation to bring the facts to the attention of the Colombian Foreign Office, to refer to the above provision, and to state that the Department did not consider that consuls were ordinarily amenable to local jurisdiction for acts performed in pursuance of official functions. The Legation replied that the Foreign Office had concurred in the view of the Department and that the court had been advised to this effect. Consul Brandt to Secretary Hull, telegram of Aug. 1, 1935, MS. Department of State, file 123 Brandt, John/68; Mr. Hull to Minister Dawson, telegram 63, Aug. 9, 1935, *ibid.*, 123 Brandt, John/70; Mr. Dawson to Mr. Hull, no. 203, Aug. 22, 1935, *ibid.*, 123 Brandt, John/75.

In 1934 the American Consul General in Bucharest was sued personally for extra wages, in lieu of notice of dismissal, by a former messenger of the Consulate. The Department concurred in the suggestion of the officer that he file an appearance, stating that he obviously had no personal liability and that if the plaintiff endeavored to substitute the Government of the United States as defendant the court would doubtless dismiss the suit on the ground that a sovereign state cannot be sued without its consent. It having subsequently appeared that the plaintiff was utilizing the action to annoy the Consul without permitting the matter to be heard, the Department instructed the Minister in Bucharest to bring the matter to the attention of the Rumanian Foreign Office, and, as to the jurisdictional aspect of the case, it said:

"While the suit has been filed against the Consul General personally, it is indisputable that the alleged basis of the suit involves solely an official act of the Consul General with respect to which he acted as the representative of the Government of the United States. Irrespective, therefore, of any technical justification which the Rumanian law may be said to afford for bringing the action against the Consul General personally, the fact remains that in necessary effect the suit is one against the Government of the United States and is, therefore, a clear violation of the universally accepted rule of international law which precludes suits against sovereign states except with their consent."

Consul General Clum to Secretary Hull, no. 237, May 23, 1934, MS. Department of State, file 123C62/328; the Assistant Secretary of State (Carr) to Mr. Clum, June 26, 1934, *ibid.* 123C62/329; the Assistant Secre-

tary of State (Moore) to the Minister in Rumania (Harrison), no. 3, Aug. 5, 1935, *ibid.* 123C62/361.

The Belgian Ambassador to the United States, in May 1935, interposed with the Department of State on behalf of a Belgian subject, formerly employed in the Consulate of the United States at Brussels, who claimed that, pursuant to the provisions of a Belgian statute, she was entitled to an indemnity upon termination of her contract. The Department replied that "Foreign laws governing contracts of employment and employment benefits are not considered as applicable to the official employment by the United States of persons for service in American diplomatic missions and consular offices." After referring to the Italian case of *Mazzucchi v. Dreyfus* (*ante*, p. 733), the Department concluded that, in view of the official nature of the claimant's employment, it was regretted that it was not feasible to give her claim favorable consideration. Count van der Straten-Ponthoz to Secretary Hull, May 10, 1935, and Assistant Secretary Carr to Count van der Straten-Ponthoz, Aug. 10, 1935, MS. Department of State, file 125.2373/182.

The Foreign Service Regulations of the United States, section III-2, note 1, January 1941, provide:

Public duties

. . . The following immunities have been secured to consular officers in most countries either by reason of public law or by treaty with the country to which the officer is assigned:

(b) Exemption from service on juries, in the militia, and from other public duties.

In response to a report from the American Consulate General at Calcutta that employees of the office were considered by the judicial authorities not to be exempt from jury duty by virtue of their American citizenship or their consular status, the Department of State transmitted to the Consul General a memorandum prepared by the Department of Justice with reference to the amenability of British consular officers to jury duty in the United States, in which it was concluded that—

it appears that the question as to whether British consular officers are required to perform jury duties, depends upon the provisions of the law of the State in which the officer is summoned for service. If the officer is not a citizen of the United States, he may not serve in those states which have fixed citizenship as one of the qualifications of a juror. Citizenship in the United States is one of the qualifications of jurors under the laws of 36 states, the District of Columbia, Hawaii, and Puerto Rico. If he be a citizen of the United States, he may be required to serve. No state laws were found exempting consular officers, as such, from jury duty.

. . . should a consular officer be called for jury duty under circumstances in which he may not claim exemption from service as a matter of right, it is still within the discretion of the court to excuse him from jury duty upon proper showing and it is doubtful whether a court would refuse to excuse a consular officer

upon a showing that to perform the service would seriously interfere with the business of the government represented by him.

Consul Groth to Secretary Hull, no. 886, Jan. 31, 1935, MS. Department of State, file 702.05/201; Assistant Secretary Carr to Consul General Howell, June 18, 1935, *ibid.* 702.05/211.

In 1927 the Department of State was informed by the Danish Minister that the Danish Honorary Vice Consul at Norfolk, Virginia, had been called for Federal jury duty. It was explained that, while the officer, an American citizen, did not desire to evade his duty, it would be likely to interfere with his consular functions, which were concerned with shipping and often required expedition. The Department replied that it had been informed by the Department of Justice that, while this officer was not as a matter of right entitled to exemption from jury duty, he had been excused. The Minister of Denmark (Brun) to the Secretary of State (Kellogg), no. 65, Apr. 25, 1927, MS. Department of State, file 702.5911/378; the Under Secretary of State (Grew) to Mr. Brun, May 11, 1927, *ibid.* 702.5911/379.

CRIMINAL PROCESS

§435

International law does not clothe consuls with immunity from the criminal laws of the countries in which they serve. If such immunity exists its sanction must be found either in the municipal law of the receiving state or in a treaty or convention between that state and the sending state. A number of the treaties and conventions to which the United States is a party provide that consuls shall not be subject to arrest except in the case of offenses denominated by local legislation as crimes and punishable as such.

See For. Ser. Reg. U.S. III-2, n. 1, Jan. 1941.

Arrest and
prosecution
generally

A consul of a foreign country is not immune from prosecution in our courts for a felony committed in the United States.

The Legal Adviser of the Department of State (Hackworth) to Miss Anne Higgins, Oct. 15, 1931, MS. Department of State, file 702.05/145.

In reply to an inquiry as to whether foreign consular officers in the United States are liable to arrest, the Department of State, in April 1939, pointed out that it was impossible to give an answer applicable to all cases, since such liability must be determined with reference to treaty provisions, if any, in force between the United States and the country whose representative is involved, but went on to say:

. . . The general principles which are applicable in the various situations treated in the questions you raise may be briefly stated.

Consuls are not diplomatic officers, and cannot of right claim the privileges and immunities generally accorded under international law to such officers.

However, consular officers possess a certain representative character, and by virtue of their official position are entitled to be treated with due respect in their dealings with national, State and local officials. It is customarily provided in consular treaties with foreign governments that, "As official agents, such officers shall be entitled to the high consideration of all officials, national or local, with whom they have official intercourse in the state which receives them".

A further right enjoyed by a foreign consular officer is that of claiming inviolability for the consulate and its archives. Even in a case where a foreign consular officer may properly be subjected to arrest or the service of process, the premises of the consulate should not be invaded for such purpose.

The Legal Adviser of the Department of State (Hackworth) to the Sheriff of Los Angeles County (Biscailuz), Apr. 17, 1939, MS. Department of State, file 702.05/301.

In a criminal prosecution against the Honorary Consul of Uruguay in a Court of First Instance in the Philippines, the defendant petitioned the Supreme Court of the Philippines for a writ prohibiting the lower court from entertaining the proceedings. The court confined its deliberations to an interpretation of the Philippine Constitution of 1935, section 3 of article VIII of which, like section 2 of article III of the Constitution of the United States, confers upon the Supreme Court original jurisdiction in cases affecting consuls. The court held that the jurisdiction so conferred was not exclusive and referred to the history of the similar provision in the Constitution of the United States. It also held that the Consul was subject to the local laws and regulations and was, accordingly, not exempt from criminal prosecution for violation of such laws. It denied the writ in a decision of July 3, 1936. The United States Supreme Court denied certiorari on February 1, 1937.

Commonwealth of the Philippines, Official Gazette, vol. XXXV, no. 71 (June 15, 1937), p. 1317; 300 U.S. 656 (1937).

In May 1934 an American Consul General reported to the Department of State that a Vice Consul at his office had been served with a summons requiring him to appear in court to answer a charge of assault and battery. It was reported that the complainant in the proceeding had insulted and threatened the Vice Consul on consular premises and had been ejected therefrom without the use of unnecessary force. The Department instructed the Consul General to explain the matter to the court but stated that if the court

insisted the Vice Consul should appear, there being no treaty provision to the contrary. The Consul General subsequently reported that the proceeding had taken place and that the case had been dismissed on the ground that the charges had not been proved.

Consul General Balch to Secretary Hull, telegram of May 26, 1934, MS. Department of State, file 123B415/153; Mr. Hull to Mr. Balch, telegram of May 26, 1934, *ibid.* 123B415/154; Mr. Balch to Mr. Hull, no. 840, June 7, 1934, *ibid.* 123B415/157.

Foreign consular officers in the United States are not exempt from arrest and criminal prosecution for a violation of a city ordinance with respect to parking of automobiles unless such exemption is specifically provided for in a treaty between the United States and the Government the consular officer represents.

The Assistant Secretary of State (Welles) to the Attorney General (Cummings), Oct. 30, 1934, MS. Department of State, file 702.2511/224.

Convention
of 1928

The Mexican Ambassador informed the Department of State, in October 1936, that a warrant of arrest had been issued by a justice of the peace in Texas against the Mexican Consul at Brownsville on a charge of criminal defamation. The Ambassador said that the order was issued because of the official activities of the Consul on behalf of Mexican citizens. The Department requested the Governor of Texas to make an investigation and to take such action as might appear warranted. Attention was invited to article 16 of the consular convention of February 20, 1928 between the United States and other American republics, stipulating:

Consuls are not subject to local jurisdiction for acts done in their official character and within the scope of their authority. In case a private individual deems himself injured by the consul's action, he must submit his complaint to the government, which, if it considers the claim to be relevant, shall make it valid through diplomatic channels.

The Department subsequently transmitted to the Ambassador the reply of the Governor stating that appropriate Federal and local officials had presented apologies to the Consul, and the Department expressed its regret that the incident had occurred. It added, however, that the offense charged appeared to be a criminal offense, and it was said that "Without undertaking to pass upon the question whether there was justification for the charge, I may say that consular officers are not accorded by international law immunity from prosecution for criminal offenses."

Ambassador Nájera to Secretary Hull, Oct. 26, 1936, and the Acting Secretary of State (Carr) to the Governor of Texas (Allred), Oct. 30, 1936, MS. Department of State, file 702.1211/2652; the Office of the Governor of Texas to Mr. Hull, Nov. 4, 1936, and the Acting Secretary of State

(Moore) to the Mexican Chargé d'Affaires ad Interim (Quintanilla), Nov. 16, 1936, *ibid.* 702.1211/2061.

As a result of an automobile accident in Germany involving an American consular officer, the question arose as to the proper interpretation of article XVIII of the treaty of friendship, commerce, and consular rights of December 8, 1923 between the United States and Germany, reading:

Consular officers, nationals of the state by which they are appointed, shall be exempt from arrest except when charged with the commission of offenses locally designated as crimes other than misdemeanors and subjecting the individual guilty thereof to punishment. [4 Treaties, etc. (Trenwith, 1938) 4199.]

The question as to whether this provision would exempt an officer from prosecution as well as from arrest was finally referred to the German Foreign Office, which, on January 15, 1934, communicated the following interpretation to the United States Embassy:

Article XVIII of the German-American Treaty of Friendship, Commerce and Consular Rights of December 8, 1923, stipulates that American consuls in Germany who possess American citizenship may *not be put under arrest* for offences and infringements. Regarding the question of the admissibility of *prosecution*, Article XVIII, as indeed the entire Treaty, says nothing. Therefore, this question must be judged in accordance with universal international law. In accordance with the latter, consuls are not extraterritorial. They consequently are liable to prosecution.

The Ambassador in Germany (Dodd) to the Secretary of State (Hull), nos. 207 (telegram) and 423, and enclosure in despatch 427, Dec. 16, 1933, Jan. 12 and 15, 1934, respectively, MS. Department of State, file 123 Morris, Shiras/54, /66, /67.

The first paragraph of article II of the consular convention of 1853 between the United States and France provides:

Convention
with
France, 1853

The Consuls-General, Consuls, Vice-Consuls or Consular Agents of the United States and France, shall enjoy in the two countries the privileges usually accorded to their offices, such as personal immunity, except in the case of crime, exemption from military billetings, from service in the militia or the national guard, and other duties of the same nature; and from all direct and personal taxation, whether federal, State or municipal. If, however, the said Consuls-General, Consuls, Vice-Consuls or Consular Agents, are citizens of the country in which they reside; if they are, or become, owners of property there, or engage in commerce, they shall be subject to the same taxes and imposts, and with the reservation of the treatment granted

to Commercial Agents, to the same jurisdiction, as other citizens of the country who are owners of property, or merchants.

1 Treaties, etc. (Malloy, 1910) 529.

The Department of State was informed in May 1909 that American consular agent King in France had been charged with an offense in the nature of deceit (*escroquerie*) which was classified as a *délit* (misdemeanor) under French law. Acting under instructions from the Department, the American Ambassador transmitted the following memorandum to the French Foreign Office:

It is settled Law of the United States that Consular Officers are not entitled under international law to exemption from the jurisdiction of local Courts. This rule is obviously necessary where Consuls engage in private business. The Department of State interprets the Consular Treaty with France as not derogating from this doctrine; and holds that the Treaty gives a Consul immunity from suit only as to his official acts and capacity, but not as to transactions connected with his private business undertakings. This does not however waive a Consul's right of personal immunity from compulsory process of the Courts, which immunity must be held to exist in all cases except as to crimes proper, but this term does not include "*délits*". Therefore while the courts of each country may sue or try a Consular Officer in reference to matters connected with his private business they may not compel his attendance at the trial, since this might interfere with the performance of his consular functions. Should a Court of one Government upon such trial pronounce judgment contemplating interference with a Consul's liberty, the other Government could relieve such Consular Officer of his official capacity and so permit the prosecuting Government to deal with him as a private person.

In its reply of June 19, 1909 the Foreign Office said that the two Governments were in accord upon the principle that "Consuls are not by virtue of international law exempt from the jurisdiction of local Courts." The note then stated:

My Department, moreover, is of opinion—like Your Excellency—that the consular convention between France and the United States of the 23rd of February, 1853, makes no derogation from this principle; the only jurisdictional immunity allowed to Consuls, rather by virtue of a constant tradition and as indispensable to the free exercise of consular functions than by virtue of the treaty, which contains no specification in this respect, bearing upon the acts done in discharge of their functions, for which they owe no accounting except to the Government which has named them.

On the other hand, Your Excellency declares that the Consular convention consecrates in favour of the respective Consuls, a personal immunity guaranteeing them against all compulsory process and all measures of constraint upon the part of the

Courts having jurisdiction in principle to prosecute and to judge them, an immunity which should be considered as extending to all cases, except cases of crime, which term does not include "délits".

Article 2 of the Consular convention of February 23rd, 1853, contains as a matter of fact the clause of personal immunity outside of cases of crime. But it is necessary to examine the sense of this stipulation and its effect. . . .

The interpretation admitted in France by the doctrine of the highest authorities, and consecrated upon divers occasions by the decisions of the Courts, assigns to such stipulation the sense of "exemption from preventative arrest", the case of crime excepted. In all other cases, the official title with which the Consul is invested is reputed to be a sufficient guarantee that he will not seek to escape by flight from the judgment and the penalties which may be incurred by him, if any.

The Foreign Office expressed the further view that by virtue of the last sentence of the above-quoted paragraph from article II of the convention :

. . . The consuls, citizens of the country in which they reside, *or* owners of property in such country, *or* engaged in commerce there, are deprived of the particular advantages which are guaranteed by the first part of article 2 in favour of all agents in general, and cannot notably invoke the benefit of a personal immunity. They are fully subject to the local jurisdiction, without being able to allege in this respect any privilege.

The Court of Appeals of Paris, on December 14, 1911, in sustaining a judgment of the Court of First Instance denying jurisdiction over the consular agent said :

Considering finally that there can be no doubt in the matter if, instead of considering only the first part of paragraph 1 of Article 2 of the Convention, one reads the entire text of the paragraph; that, in effect, a final stipulation defines that if the American Consul engages in commerce in France, he "shall be subject to the same jurisdiction as other citizens of the country", that, therefore, he is not subject to local jurisdiction when he confines himself to the discharge of his duties;

Considering, therefore, that the meaning of the stipulation is clear and precise; that it signifies indisputably that, in repressive matters, consuls and consular agents may not be pursued before the French courts except in cases where they have been found guilty of crime. [*Gazette du Palais*, 1912, I, 27 (D.P. 1915.183), translation from Consulate General in Paris; see enclosure to despatch 1561, Nov. 10, 1926, MS. Department of State, file 811.111 Zizianoff, Nina Princess.]

However the judgment was reversed on February 23, 1912 by the Criminal Chamber of the Court of Cassation, which apparently based its decision on communications from the Foreign Office con-

cerning the above correspondence between the Foreign Office and the American Embassy. After stating that it was bound to follow the official interpretation of the treaty by the Government, the court said that—

the official interpretation of these provisions, particularly of the term "personal immunity" whose meaning and effect were in question in this case, having been requested of the Government for production at the trial, the Ministry of Foreign Affairs stated in communications of November 25 and December 4, 1911, . . . that the two Powers were in complete accord on the question of principle; that the result of their bilateral interpretation was that the clause on the personal immunity of consular agents should not extend to immunity from the territorial jurisdiction in punitive matters, but only to exemption from preventive arrest and detention. [117 *Bulletin des Arrêts (Criminelle)* 189 (D.P. 1915.1.83), translation from Hudson, *Cases and Other Materials on International Law* (2d ed., 1936) 893.]

The Ambassador in France (White) to the Secretary of State (Knox), telegrams of May 14 and 15, 1909, MS. Department of State, files 18024/1, /2. Memorandum from the Embassy in Paris to the French Foreign Office, June 12, 1909; the French Foreign Office to Mr. White, June 19, 1909 (enclosure in despatch 792); Mr. White to Mr. Knox, June 24, 1909: *ibid.* 18024/26-33.

In October 1926 the Department of State was notified by the American Consul General in Paris that two citations had been left at the Consulate General instituting civil and criminal proceedings against an American Consul on grounds of refusing plaintiff's application for a passport visa and of having libeled and defamed her in stating his reasons to the press. The Consul General said that a procedure had been followed under which a civil judgment could not be rendered unless accompanied by a criminal penalty and informed the Department that the offense was a *délit* (misdemeanor) under French law rather than a crime; also that he had moved that the proceedings be quashed on the ground that the Consul's official acts could not be reviewed. The Department approved the action and also informed the Embassy that it considered that the refusal of the visa was an official act and that any effort by the court to review it or to hold the Consul responsible therefor was entirely improper. The Department did not consider that the defamation charged constituted an official act. The ultimate decision on the merits was for the defendant. As to the prosecution on this charge, the Ambassador was referred by the Department to article II of the convention of 1853 (*ante*, p. 739). On December 2, 1926 it informed him that it did not consider that the article conferred immunity upon consuls in civil and criminal proceedings charging misdemeanors. The phrase "such as personal immunity" was interpreted as meaning immunity from physical de-

tention rather than from suit, and the belief was expressed that immunity from local jurisdiction could not be claimed, unless by virtue of the most-favored-nation provision in article XII, in the event that consuls of other countries enjoyed such privileges. In a later instruction the Department reiterated the above view but said that the defendant's attorney would not be prevented from claiming immunity if he saw fit to do so. With reference to the *King* case in 1912 (*ante*, pp. 740-742) and the correspondence between the Embassy and the French Foreign Office upon which the opinion of the Court of Cassation was based, the Department said:

It is important to observe, with reference to the statement in the decision of the Cour de Cassation, mentioned above, that this Government did not agree to the contention in the note of June 19, 1909, from the Foreign Office to Ambassador White, that the "personal immunity" provided for in Article II of the Treaty, relates only to "exemption from arrest and preliminary detention". The Department considers that the phrase in question was intended to insure to American Consuls in France and French Consuls in the United States immunity from arrest or imprisonment in all cases, except cases in which Consuls are accused of crimes proper. In other words, the Department considers that this provision was intended to insure immunity from arrest or imprisonment under the judgment of a court as well as preventive arrest or imprisonment. As it appears that persons convicted of the offenses with which Mr. . . . is charged are liable to be punished with imprisonment instead of a fine, it seems important to inform the Foreign Office of the position of this Government with regard to the point just mentioned.

In a note of March 5, 1927 to the Foreign Office the Embassy transmitted the above statement and added:

. . . I am authorized by my Government to call Your Excellency's special attention to the provision of Article XII of the Treaty of 1853, that Consular officers "shall enjoy in the two countries all the other privileges, exemptions and immunities which may at any future time be granted to the agents of the same rank of the most favored nation," and to inquire whether, in accordance with this provision, the French Government may not see fit to have the suits . . . withdrawn, especially in view of the decision of the Court at Dieppe on January 22, 1900, in the suit against Lee Jortin, British Vice-Consul at Dieppe, in which the Court held that it had no jurisdiction, and the decision of the Court of Appeals at Rouen of May 11, 1900, confirming the decision of the lower Court (Clunet 1900, 130, 858); also the decision of the Police Court of the Seine of July 8, 1890, holding that it had no jurisdiction of the suit against Manolopoulos, Chancellor of the Greek Consulate General at Paris (Clunet 1890, 667).

The Correctional Tribunal of the Seine, in a decision of April 5, 1927, confined to the question of jurisdiction, and holding itself competent, stated that a question arising from indefiniteness of expression in a treaty provision, being a question of public international law, was for the interpretation of the governments which made the agreement. The court, after referring to the above decision of the Court of Cassation in the *King* case, the bilateral interpretation of the treaty by the United States and France therein assumed, and the Embassy's note of March 5, 1927, stated that—

apart from the divergence relative to exemption from arrest and detention, the two governments, American and French, are in accord in recognizing the competence of their respective civil, correctional and criminal courts with regard to the acts of consuls, with the exception, of course, of acts in their official capacities; since the letter of the American Ambassador contemplates the case of an arrest or an imprisonment in virtue of a judgment, it necessarily implies the appearance of the consular agent before a court.

The court interpreted the most-favored-nation clause of article XII in connection with the consular convention of 1876 between France and Greece specifically exempting consuls from arrest and imprisonment, except for a crime, and said that—

if the convention between France and Greece expressly mentions exemption from arrest and imprisonment, as is not done in the convention between France and the United States, it does not free in an express way the consular agents of the two contracting countries from the jurisdiction of the respective courts of the said countries, and it follows that it does not modify in any way the interpretation above reproduced of the expression "personal immunity". [*Princess Zizianoff v. Kahn and Bigelow*, *Gazette du Palais*, 1927, II, 18, translation from 21 A.J.I.L. (1927) 811.]

In an instruction of June 29, 1927 the Department expressed the opinion that the rights guaranteed by article XII were entirely independent of any limitations of article II. In this and a subsequent instruction of December 1, 1927 the Embassy was requested to bring this view to the attention of the Foreign Office. The above decision was affirmed by the Court of Appeal of Paris on January 28, 1928, *Gazette du Palais*, 1928, I, 727, translation from 23 A.J.I.L. (1929) 172.

Later, in April 1928, the Embassy was instructed to inform the Foreign Office that "The Department . . . has never accepted the view of the Ministry that the term 'personal immunity' as used in Article II of the Convention is understood only as insuring exemption from preventive arrest and imprisonment." Reference was also

made to the Embassy's note of March 5, 1927 regarding most-favored-nation treatment, and it was said that the absence of any reference to the matter in Ambassador White's memorandum of June 19, 1909 "cannot be interpreted as limiting this Government's right to claim the full effect for its consuls of the most-favored-nation clause in the Convention of 1853". The decision of the Court of Appeal was affirmed by the Court of Cassation on December 15, 1928 [*133 Bulletin des Arrêts (Criminelle)* 619 (6 D.H. 1929.1.69)]. On the merits the judgment was for the defendant.

Consul General Skinner to Secretary Kellogg, telegram of Oct. 27, 1926, and no. 1517 of Oct. 28, 1926; Mr. Kellogg to Mr. Skinner, telegram of Oct. 28, 1926; Mr. Kellogg to Ambassador Herrick, Oct. 28, 1928; Mr. Skinner to Mr. Kellogg, telegram of Nov. 3, 1928; Mr. Kellogg to Mr. Herrick, telegram 302, Dec. 2, 1926; the Assistant Secretary of State (Carr) to Mr. Herrick, no. 2144, Jan. 5, 1927; Mr. Herrick to the Minister of Foreign Affairs (Briand), Mar. 5, 1927 (enclosure in despatch no. 21); Consul General Gaulin to Mr. Kellogg, Mar. 20, 1927; Mr. Kellogg to Mr. Herrick, telegram 198, June 29, 1927; Mr. Carr to the American Chargé d'Affaires ad Interim in France (Whitehouse), no. 2526, Dec. 1, 1927; Mr. Carr to Mr. Herrick, no. 2723, Apr. 10, 1928; Consul General Keena to Secretary Hull, nos. 02985 and 04347, Mar. 21, 1933, and Mar. 22, 1935 (enclosing decisions of the Court of Appeal of Paris of Mar. 13, 1933 and of the Court of Cassation of Mar. 9, 1935 on the merits of this case): MS. Department of State, file 811.111 Zizianoff, Nina Princess.

The District Court of the United States for the Southern District of New York decided in 1935 that the convention of 1853 between the United States and France granting consular officers "the privileges usually accorded to their offices, such as personal immunity, except in the case of crime" did not operate to relieve a Rumanian Vice Consul (who invoked the French treaty under a most-favored-nation clause in a consular convention between the United States and Rumania, 2 Treaties, etc. [Malloy, 1910] 1505) from being served with summons. The nature of the action does not appear. The court examined certain authorities and said that there appeared to be no reason for construing "personal immunity, except in case of crime" to mean more than immunity from arrest and imprisonment except in case of crime.

United States v. Tarouanu, 10 F. Supp. 445 (S.D.N.Y., 1935).

In the case of a former American Vice Consul, a French citizen, who, at the instance of an American consular officer acting under instructions of the Department of State, was prosecuted in the French courts for embezzlement, it was reported to the Department that the French Court of Correction had held that it had no jurisdiction since defendant was a consular officer at the time of the alleged offense and since consular immunity cannot be waived. The De-

Waiver of
immunity

partment instructed the Ambassador in France to inform the French Foreign Office of the facts of the case and to explain that when the offense was discovered the Vice Consul's commission was canceled. He was to state that the Government of the United States desired that the case should be tried on its merits in spite of the consular immunity claimed by the defendant and that he had been directed to state affirmatively that the United States did not desire to claim any immunity whatsoever in this case. The defendant was convicted.

The Consul General at Large (Totten) to the Secretary of State (Colby), no. 32, July 26, 1920, and the Second Assistant Secretary of State (Adee) to the American Ambassador in France (Wallace), no. 601, Sept. 18, 1920, MS. Department of State, file 125.2235/125; the Consul at Bordeaux (Jaekel) to the Secretary of State (Hughes), no. 497, Apr. 10, 1922, *ibid.* 125.2235/159.

A memorandum of the Office of the Solicitor for the Department of State, with reference to the above matter, discussed the question whether the executive department of the Government of the United States could constitutionally waive a privilege which was conferred on consuls by treaty. It was argued that the word *privilege* necessarily included the idea that it might or might not be exercised, that the privilege was conferred for the benefit of the government rather than the individual, and that the government accordingly had the power to waive it. The memorandum pointed out further that the position of the Department might be maintained on the ground that the offense in this case was a crime under Anglo-Saxon law, although it was not so considered under French law. MS. Department of State, file 125.2235/129.

JURISDICTION OF COURTS IN UNITED STATES

§436

Article III, section 2, of the Constitution of the United States provides:

The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls . . .

In all Cases affecting Ambassadors, other public Ministers and Consuls . . . the supreme Court shall have original Jurisdiction.

Section 24, paragraph 18, of the Judicial Code of the United States contains provision that the District Courts shall have original jurisdiction "Of all suits against consuls and vice consuls", while section 233 states that the Supreme Court shall have "original, but not exclusive, jurisdiction, of all suits . . . in which a consul or vice consul is a party". Section 256, paragraph 8, of the Code provides that the jurisdiction vested in the courts of the United States in "all suits and proceedings against . . . consuls or vice consuls" shall "be exclusive of the courts of the several States".

36 Stat. 1087, 1091, 1093, 1156, 1160-1161; 28 U.S.C. §§41, 341, and 371. In a revision of Feb. 18, 1875 (18 Stat. 318) of the act of 1789 (1 Stat. 77; Rev. Stat., sec. 711) the clause giving the Federal courts exclusive jurisdiction in suits against consuls and vice consuls was repealed, and, until the revision of the laws relating to the judiciary by the act approved on Mar. 3, 1911 (36 Stat. 1087), there was no similar statute, the question of jurisdiction over consular officers being thereby left in considerable doubt. For a case in this period holding that State courts had jurisdiction of civil actions against consuls, see *Delcon v. Walter*, 163 Ala. 499, 50 So. 934 (1909).

In a communication of February 24, 1914 from the Department of Justice to the Department of State concerning a prosecution for a statutory crime instituted against a foreign consul in the courts of California, it was said:

From a careful investigation of the authorities it would seem that there is no way to reach the Consul by criminal proceedings. It is settled that the State courts have no jurisdiction, and apparently the United States courts would have none, since the offense referred to is not made a crime by any law of the United States. It is true that in the case of *In re Iasigi*, 79 Fed., 751, 753, there is a dictum of Judge Brown to the effect that the Federal courts would have exclusive jurisdiction of offenses by consuls, whether at common law or under State or United States statutes. There does not appear to be, however, any authority upholding this view, and a manuscript opinion of the Attorney General to the contrary in the *Kosloff Case* is referred to in *Moore's Digest*, Vol. 5, p. 66. On the whole I am of the opinion that there is no jurisdiction in the Federal courts to proceed against a consul except where he has offended against some specific criminal law of the United States.

State and
Federal
courts

The Assistant Attorney General to Secretary Bryan, Feb. 24, 1914, MS. Department of State, file 702.2411/15.

In 1915 a German Consul in the State of Washington was arrested on a charge of conspiracy as defined by a statute of that State. In a communication to the Governor of Washington, the Department of State quoted the statement of the Department of Justice of February 24, 1914 (*ante*). In reply the Governor transmitted a communication from the local prosecuting attorney expressing the view that the question of jurisdiction should be adjudicated in the courts. The Department thereupon informed the Governor that—

While there may be no recorded judicial interpretation of the provision of the judiciary act referred to in the Department's letter of April five, it seems reasonably certain that the State courts have no jurisdiction in the case pending against the German Consul. For this reason . . . the Department deems it desirable that the case be dismissed.

The Department reached an understanding with the German Ambassador that if the charge were dismissed the Consul would be transferred. The charges were subsequently dismissed.

The German Ambassador (Von Bernstorff) to the Counselor of the Department of State (Lansing), Mar. 23, 1915, MS. Department of State, file 702.6211/214; the Secretary of State (Bryan) to the Governor of Washington (Lister), telegram of Apr. 5, 1915, *ibid.* 702.6211/215; Mr. Lister to Mr. Bryan (with enclosure), Apr. 12, 1915, and Mr. Bryan to Mr. Lister, telegram of Apr. 26, 1915, *ibid.* 702.6211/218; Count von Bernstorff to Mr. Bryan, Apr. 21, 1915, *ibid.* 702.6211/221; Mr. Lister to Mr. Bryan, telegram of May 13, 1915, *ibid.* 702.6211/228.

In 1916 the Greek Legation in Washington called the attention of the Department of State to an alleged violation of the rights of the Greek Consul General in San Francisco by the rendering of a judgment against him in private civil litigation in a local State court. (Case unreported.) The Department suggested to the Governor of California that the court had not given consideration to the provisions of the Judiciary Act of 1911 vesting exclusive jurisdiction over suits and proceedings against consular officers in the courts of the United States. Reference was made to the communication of February 24, 1914 from the Attorney General (*ante*) and it was said:

While the Attorney General's opinion related to a criminal case, the language of the Act of March 3, 1911, which broadly vests exclusive jurisdiction in the federal court "in all suits and proceedings" against consular officers, appears to withdraw jurisdiction from the State courts alike in civil and in criminal proceedings against foreign consular officers.

The Chargé d'Affaires ad interim of Grece (Vouros) to the Secretary of State (Lansing), Mar. 14, 1916, MS. Department of State, file 702.6811/59; Mr. Lansing to the Governor of California (Johnson), June 20, 1916, *ibid.* 702.6811/71b.

Divorce

In 1927 an American citizen brought a suit for divorce in the courts of Ohio against a Rumanian consular officer who was a subject of Rumania. The defendant petitioned the Supreme Court of Ohio for a writ prohibiting the Court of First Instance from entertaining the suit. The writ was denied, the court holding that article 3, section 2, of the Constitution of the United States did nothing more than to extend the judicial power of the United States to cases involving consular officers and to leave it to Congress to determine whether such jurisdiction should be exclusive. It stated that while the language of paragraph 8 of section 256 of the United States Judicial Code (*ante*, p. 746) is clear "yet it must be said that Congress has not by that very clear language clearly manifested the legislative intent. . . . By its omission to make any pro-

vision for the trial of divorce and alimony suits against foreign consuls in the federal courts, it has manifested an intent and purpose to leave such controversies to the courts of the states."

The Supreme Court of the United States affirmed the judgment of the Supreme Court of Ohio. Mr. Justice Holmes, speaking for the court, said:

The language so far as it affects the present case is pretty sweeping but like all language it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used. It has been understood that, "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States," . . . and the jurisdiction of the Courts of the United States over divorces and alimony always has been denied. . . . A suit for divorce between the present parties brought in the District Court of the United States was dismissed. *Popovici v. Popovici*, 30 Fed. (2d) 185.

The words quoted from the Constitution do not of themselves and without more exclude the jurisdiction of the State. *Plaque-mines Tropical Fruit Co. v. Henderson*, 170 U.S. 511. The statutes do not purport to exclude the State Courts from jurisdiction except where they grant it to Courts of the United States. Therefore they do not affect the present case if it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce. If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes. "Suits against consuls and vice-consuls" must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts.

In the absence of any prohibition in the Constitution or laws of the United States it is for the State to decide how far it will go.

The State ex rel. Popovici, Vice Consul of Roumania v. Agler et al., Judges, 119 Ohio St. 484, 493; 164 N.E. 524, 527 (1928); *Ohio ex rel. Popovici, Vice-Consul of Roumania v. Agler et al.*, 280 U.S. 379, 383-384 (1930). The divorce proceeding was originally brought in the District Court of the United States for the Northern District of Ohio, which granted a motion for dismissal on the ground that the courts of the United States do not have jurisdiction over divorce suits. *Popovici v. Popovici*, 30 F. (2d) 185 (N.D. Ohio, 1927).

In *Ellen E. Higginson v. Eduardo Higginson*, 96 Misc. 457, 158 N.Y. Supp. 92 (1916), it was held by the New York Supreme Court that a State court had no jurisdiction over an action for separation brought against a consul.

See Surridge, "Jurisdiction Over Suits Against Foreign Consuls in the United States", 80 U. of Pa. L. Rev. (1932) 972.

In a letter of Aug. 1928 the Department of Justice informed the Department of State that a foreign consular officer in the United States had been

arrested and prosecuted in a State court on two charges, namely, assaulting a police officer, an offense under the State law, and disorderly conduct, an offense under a city ordinance. The consul was convicted, but upon appeal the case was dismissed on the ground that the State court had no jurisdiction over offenses against consuls. The Department of Justice indicated an intention to prosecute the consul in the Federal courts. In a memorandum enclosed with the letter the view was expressed that paragraph 18 of section 24 of the Judicial Code (*ante*, p. 746) was on an equal footing with the second paragraph of that section giving the Federal courts jurisdiction over "all crimes and offenses cognizable under the authority of the United States"; that paragraph 8 of section 256 was not subordinate to the first paragraph thereof (same as paragraph 2 of section 24) and that, consequently, the Federal courts had jurisdiction "of all suits and proceedings against . . . consuls or vice-consuls", that if the State courts did not have jurisdiction of offenses by such officers and if Federal courts had jurisdiction only of offenses under Federal laws, consular officers would be exempt from prosecution for a large number of the most serious crimes; that under international law consuls are subject to criminal prosecution; that Congress had never expressed an intention to exempt them from such prosecution and that it was extremely doubtful that Congress had such an intention. The motive for withdrawing such jurisdiction from the State courts was said to be an entirely different reason of public policy, having relation to the fact that the Federal Government was charged with the conduct of foreign relations and that it was considered proper that Federal courts should have jurisdiction over proceedings involving representatives of foreign governments. On the question whether Federal courts could enforce State laws, it was pointed out that this was a common occurrence in civil proceedings. It was further said that "A man may be tried in a Federal court for an offense against the State which is not an offense against the United States", citing the cases of *Tennessee v. Davis*, 100 U.S. 257 (1879), and *Virginia v. Paul*, 148 U.S. 107 (1893). In the former case, the Federal courts were held to have jurisdiction in a criminal proceeding against a Federal officer for violation of a State law. It was said that the only distinction between this case and the case of a consul was that the situation in *Tennessee v. Davis* involved a specific statute authorizing removal of such cases to the Federal courts. It was argued that this did not affect the fundamental principles of jurisdiction and that, in view of the likelihood that Congress never intended consular officers to be exempt from prosecution for such offenses, the Federal courts must be considered to possess jurisdiction.

The Department of State concurred in the view of the Department of Justice that there was sufficient basis to warrant prosecution of the consul in the Federal courts. It explained however that the ambassador of the country represented by the consul had promised that the consul would be removed, and the hope was expressed that the prosecution would not be undertaken.

The Assistant Attorney General (Luhning) to the Secretary of State (Kellogg) (with enclosure), Aug. 17, 1928, MS. Department of State, file 702.2511/180; the Department of State to the Attorney General (Sargent), Sept. 24, 1928, *ibid.* 702.2511/181.

Contempt
of local
court

In July 1931 the Department of State informed the Governor of Illinois that it had been advised by the Mexican Embassy that the Mexican Consul at Chicago had been placed under arrest by a judge

of the Municipal Court on a charge of contempt of court. The Department referred to section 256 of the Judicial Code of the United States (*ante*, p. 746) and requested that the Governor take appropriate steps to effect the release of the Consul. The facts seemed to be disputed, but the judge's contention was that the Consul had created a disturbance during court proceedings involving Mexican citizens. The Governor transmitted a report to the Department of State from which it appeared that the charges had been withdrawn and that the appropriate authorities had expressed regret at the incident.

The Acting Secretary of State (Castle) to the Governor of Illinois (Emmerson), telegram of July 7, 1931, MS. Department of State, file 702.1211/2127A; Mr. Emmerson to Secretary Stimson, July 13, 1931, *ibid.* 702.1211/2140.

The Department of Justice, in 1934, transmitted to the Department of State a copy of its reply to an inquiry from a United States attorney concerning the jurisdiction of a State court over a traffic violation by a foreign consular officer. After referring to the constitutional and statutory provisions, the Department of Justice said that—

it now seems settled that the State courts have no jurisdiction of proceedings against consuls.

These statements must not be taken to hold that consuls are not subject to prosecution, but *only that they are not subject to prosecution in the State courts*, for it is the law that unless the Treaty between the United States and the country he represents specifically exempts him a consul is not entitled by virtue of his office, to the immunities of a foreign minister but is subject civilly and criminally like other residents to the tribunals of the country in which he resides. 2 C.J. 1305. The rule is that though the offending consul is not immune from prosecution, he is subject to prosecution *only* in cases in which the Federal courts have jurisdiction.

It goes without saying that the Federal courts would have no jurisdiction to enforce a State statute, as it is well settled that the Federal courts have no jurisdiction to try and sentence an offender unless it appears that the offense charged is defined by an Act of Congress, *United States v. Mossew*, 266 Fed. 18, and cases therein cited.

In view of the conclusions herein reached, it would seem that there is nothing for you to do in the matter except to advise the Attorney General of the State of Maryland that the State courts have no jurisdiction in the case presented.

Enclosure in letter of Nov. 13, 1934 from the Assistant Attorney General (Keenan) to the Secretary of State (Hull), MS. Department of State, file 702.2511/226.

In denying the appeal of a defendant who claimed that he was a Vice Consul of Peru and therefore immune from the jurisdiction of the court, the California District Court of Appeals said:

Subsequent
acquisition of
consular
status

Jurisdiction over actions against vice consuls is vested in the courts of the United States, "exclusive of the courts of the several States." Judicial Code, §256; . . . It does not appear, however, that the defendant was a vice consul when the pleadings were filed, or at anytime prior to the day when he testified at the trial. In the absence of any citation of any decision to the contrary, we are of the opinion that, the court having acquired jurisdiction over the defendant, such jurisdiction was not divested by the fact that, perhaps on the very day of trial of the action, the defendant was appointed to a vice consular office.

Henry Edmund Earle v. L. S. DeBesa et al., 109 Calif. App. 619, 621, 293 Pac. 885, 886 (1930).

Jurisdiction
of courts in
U.S. over
American
Consuls

In January 1938 an American Consul in Canada informed the Department of State that he had received an order from a Circuit Court in Illinois authorizing its master in chancery to demand and request access to the files of his office for the purpose of examining papers relating to a visa application and to obtain a photostatic copy of a certain letter. The Department of State instructed the Consul that he was not obliged to comply with the order but that he might accede to the request for a photostatic copy of the letter if he saw no objection.

Consul Vance to Secretary Hull, no. 783, Jan. 20, 1938, and Assistant Secretary Messersmith to Mr. Vance, Feb. 9, 1938, MS. Department of State, file 811.111 Emmer, C. Edward.

An application to the United States Supreme Court for leave to file a petition for a ruling directing an American Consul in Canada to show cause why a writ of mandamus should not issue requiring him to issue a certain visa was denied by the court for want of original jurisdiction. Referring to article III, section 2, of the Constitution (*ante*, p. 746) the court said:

Manifestly, this refers to diplomatic and consular representatives accredited to the United States by foreign powers, not to those representing this country abroad. *Milward v. McSaul*, 17 Fed. Cas. 425, 426, No. 9624. The provision, no doubt, was inserted in view of the important and sometimes delicate nature of our relations and intercourse with foreign governments. It is a privilege, not of the official, but of the sovereign or government which he represents, accorded from high considerations of public policy, considerations which plainly do not apply to the United States in its own territory.

Ex parte Gruber, 269 U.S. 302, 303 (1925).

In reply to a despatch stating that an American Vice Consul at Nogales, Mexico, had been subpoenaed by a United States Grand Jury in Arizona concerning visa matters, the Department stated that it had no objection to his appearance.

Consul Damm to Secretary Kellogg, telegram of Apr. 30, 1928, and Mr. Kellogg to Mr. Damm, May 3, 1928, MS. Department of State, file 123P874/3.

There is no rule requiring American consular officers in foreign countries to appear and answer suits brought against them in the United States. In the event of inability to make service in the United States, the only alternative is to bring suit against the officers in the country of their residence.

The Director of the Consular Service (Carr) to Everett, Clarke, Benedict, and Ward, Oct. 25, 1910, MS. Department of State, file 122.392.

GIVING OF TESTIMONY

§437

A letter from the Senate at Danzig to the Dean of the Consular Corps concerning the rights and standing of consular officers in Danzig, particularly with respect to their immunities from the jurisdiction of the local courts, was communicated to the Department of State by the American Consul in that city. The Department, in its reply, remarked:

As indicated in the communication from the Danzig Senate, Consuls do not enjoy the extraterritorial status accorded diplomatic officers. International practice, however, concedes to them such privileges and immunities as are necessary to enable them to discharge the duties of their office, including the inviolability of the consular archives and the official property of their Government. While, in the absence of applicable treaty provisions, consular officers are not exempt from being called as witnesses by the Tribunals of the country in which they are stationed, or from giving testimony both in civil and criminal cases, they cannot be required to testify as to the contents of the consular archives nor as to information which has come to them in their official capacity.

Consul Heisler to Secretary Stimson, no. 7, Apr. 7, 1932, and Assistant Secretary Carr to Mr. Heisler, June 23, 1932, MS. Department of State, file 702.05/152.

An American consular officer in Canada informed the Department of State, in 1910, that he had been summoned to appear as a witness in a civil suit and stated that he could find no provisions for exemp-

Duty to
respond to
summons

tion in treaties between the United States and Great Britain. The Department replied:

You should appear as a witness and give your testimony unless you can get excused by the court on ground that it will interfere with the performance of your official duties.

Consul Jones to Secretary Knox, telegram of Nov. 20, 1910, and Mr. Knox to Mr. Jones, telegram of Dec. 1, 1910, MS. Department of State, file 123J71/38.

Replying to an inquiry from an American Consul in India, the Department of State said that—

it is the Department's opinion that when a consular officer is cited to appear as a witness in a suit he should promptly respond. If his official business should make it embarrassing to appear at the time specified he should so advise the authorities and ask that another date be fixed for his appearance. It is believed that a request of this nature would readily be assented to, but it should be borne in mind that in the absence of a treaty exempting a consular officer from being summoned as a witness it is incumbent upon him to appear when duly summoned.

Consul Lupton to Secretary Lansing, no. 212, Apr. 3, 1919, MS. Department of State, file 123L97/109; the Chief of the Consular Bureau (Hengstler) to Mr. Lupton, no. 93, Oct. 21, 1919, *ibid.* 123L97/110. To similar effect, see the Assistant Secretary of State (Carr) to the Consul General at Montreal (Frost), June 25, 1930, *ibid.* 123F92/231.

In April 1924 the Polish Legation in Washington informed the Department of State that a Polish Consul General had been subpoenaed by the Supreme Court of New York to produce documents and give testimony but that the subpoena had been withdrawn when it was explained to the court that such procedure was not in conformity with international law and custom. The Legation requested that it be established for the future guidance of consuls of his nationality "that the custom accepted by international law of exempting consuls from the obligation to appear as witnesses before the courts in the states in which they discharge their duties is extended to the consular officers of Poland in the United States". The Department replied:

While international practice appears to concede to a consular officer such privileges and immunities as are necessary to enable him properly to discharge the duties of his office, including inviolability for the archives and official property of his Government, a consular officer is not, in the absence of applicable treaty provisions, believed to be exempt from the giving of testimony with respect to matters not pertaining to his official consular business.

The appropriate courts in this country would doubtless be disposed to give full consideration to the question whether foreign

consular officers are exempt from the giving of testimony in cases in which the testimony of such consular officers may be desired.

The Polish Legation to the Department of State, Mar. 22, 1924, and the Secretary of State (Hughes) to the Polish Minister (Wróblewski), Apr. 7, 1924, MS. Department of State, file 702.60c11/105.

In 1927 a committee of the United States Senate, engaged in investigating the publication in the press of certain purported documents, caused to be served upon the Mexican Consul General in New York city a summons to appear and testify concerning the authenticity of the documents. In a note to the Secretary of State the Mexican Ambassador in Washington said that—

my Government in cases whose significance is similar to that with which we are now concerned, holds the opinion that in conformity with the elemental principles and practices of international law, the Government of the United States ought to extend to the Consul General of Mexico in New York complete immunity not to obey the order which has been made to him.

The Ambassador at the same time expressed the desire of his Government to be of assistance in the investigation and its willingness to cooperate "if it found a possibility of doing so while protecting in an unequivocal manner, on the one side, the rights which, in conformity with the principles and practices of international law, appertain to its Agents duly accredited to foreign Governments, and, on the other hand, the national dignity". On the same day the Senate committee informed the Department that, in view of the assurances of the Mexican Ambassador that the Consul General would attend at the desired time and place, the subpoena had been quashed and withdrawn. The Department thereupon wrote the Ambassador that—

in order to avoid possible future misunderstanding I should, with all respect, record the fact that the views of the Government of the United States on the relevant questions of international law do not coincide with those expressed through you by the Government of Mexico, and that the position of my Government is, therefore, to be regarded as fully reserved.

The Mexican Ambassador (Téllez) to the Secretary of State (Kellogg), Dec. 14, 1927, MS. Department of State, file 817.00H35/20; Senator Reed to Mr. Kellogg, Dec. 14, 1927, *ibid.* 817.00H35/25; the Under Secretary of State (Olds) to Señor Téllez, Dec. 16, 1927, *ibid.* 817.00H35/20.

The Department of State, having been informed by the Department of Justice that the Colombian Consul at Chicago, whose testimony was desired in a criminal case, had raised the question of the propriety of his testifying in behalf of the Government of the United States without the consent of his own Government, replied

that there was no rule of international law under which consuls were immune from the duty of appearing in courts of law to testify as witnesses, when summoned by the appropriate authorities.

The Assistant Attorney General (Luhning) to the Secretary of State (Stimson), Oct. 18, 1929, and the Assistant Secretary of State (White) to the Attorney General (Mitchell), Oct. 31, 1929, MS. Department of State, file 702.2111/274.

In reply to a despatch from the American Ambassador to Japan stating that an American Vice Consul might be requested to testify in criminal proceedings, the Department of State, in February 1931, said that "since the Vice Consul is subject to the jurisdiction of the local authorities he can not refuse to testify if subpoenaed or requested to do so".

Ambassador Forbes to Secretary Stimson, no. 114, Jan. 22, 1931, and Mr. Stimson to Mr. Forbes, telegram 25, Feb. 16, 1931, MS. Department of State, file 894.34/92.

An American Consul in Mexico reported to the Department of State, in 1925, that he was to be cited to give testimony in a civil suit between American citizens regarding mortgage documents which he had examined in endeavoring to settle the matter by arbitration. He stated that the consular archives were not involved and that the court would come to his office or residence for the purpose of making the interrogatories. The Department raised no objection.

Consul Myers to Secretary Kellogg, telegram of Sept. 13, 1925, and Mr. Kellogg to Mr. Myers, telegram of Sept. 16, 1925, MS. Department of State, file 702.05/53.

In May 1932 the American Consul at Chihuahua, Mexico, was requested by local officials to execute an affidavit setting forth statements made to him by an informant concerning the presence of counterfeiting equipment in the Mexican mails. The Consul had reported the request to the American Embassy in Mexico City, which had called his attention to article 15 of the Habana convention of February 20, 1928. 4 Treaties, etc. (Trenwith, 1938) 4740. The article provides:

In criminal cases, the prosecution or the defense may request attendance of consular agents at the trial, as witnesses. This request must be made with all possible consideration to consular dignity and to the duties of the consular office and shall be complied with by the consular official.

Consular agents shall be subject to the jurisdiction of the courts in civil cases, although with the limitation that when the consul is a national of his state and is not engaged in any private business with purposes of gain, his testimony shall be

taken either verbally or in writing, at his residence or office, with all the consideration to which he is entitled.

The Department instructed him:

In view of the fact that this Convention has come into force with respect both to the United States and Mexico, the Department is of the opinion that you should have acceded to the request mentioned and you will be governed accordingly should the request be renewed and with regard to other similar requests which may be made in the future.

Consul Styles to Secretary Hull, no. 332, May 27, 1932, MS. Department of State, file 811.5158/1674; Assistant Secretary Carr to Mr. Styles, June 7, 1932, *ibid.* 811.5158/1675.

The American Consul General in Toronto was requested by a representative of the Canadian Government to allow an officer of the Consulate to appear in court to testify in a criminal action. The Consul General was of the opinion that testimony was desired to prove that passport visas could not be obtained for applicants by third parties. The Department instructed the Consul General that under the circumstances it interposed no objections to compliance with the request as distinguished from an order or subpoena issued by the court. It was added that contents of confidential communications should not be disclosed.

Consul General Hengstler to Secretary Hull, telegram of Mar. 30, 1939, and Mr. Hull to Mr. Hengstler, telegram of Apr. 1, 1939, MS. Department of State, file 150.009 Paphesh, John A.

The American Consul at Catania, Italy, received a subpoena from a local court in the usual form, which stated that he would be subject to penalty upon failure to appear. The Consul wrote to the court objecting to the form of the summons, whereupon the court explained that the Consul's official position had not been known and asked that the language complained of be ignored.

Form of
subpena

Consul Weddel to Secretary Bryan, nos. 80 and 81, Jan. 8 and 12, 1914, MS. Department of State, files 125.2853/48, /49.

In 1937 the Department of State authorized the Consul at Beirut, Syria, to appear and testify at the trial of a person accused of murdering the American Consul General at that place but suggested that he might consider it desirable to inform the appropriate authorities that his appearance as a witness was not to be construed as constituting a precedent in derogation of the provisions of the third paragraph of article II of the American-French consular convention of February 23, 1853 (1 Treaties, etc. [Malloy, 1910] 529), providing that consular officers "shall never be compelled to appear as witnesses

before the courts" and stipulating that when a declaration for judicial purposes "is to be received from them in the administration of justice, they shall be invited, in writing, to appear in court, and if unable to do so, their testimony shall be requested in writing, or be taken orally at their dwellings".

Secretary Hull to Consul Steger, telegram of Oct. 19, 1937, MS. Department of State, file 123M34/321.

In 1928 the American Consul at Martinique, Fr.W.I., reported to the Department of State that local police officials had come to the Consulate to take his deposition in connection with an alleged breach of the peace to which he was a witness and that, on the basis of the above treaty, he refused to make a statement. The Department replied:

"The Department interprets these provisions to mean that your presence in court or in the alternative, your deposition, shall be requested in writing and not asked for orally by representatives of the local authorities calling at your consulate. Presumably your testimony could have been taken orally at your dwelling without a request in writing. However, this does not appear to have been contemplated by the police officials in this case.

"Your action in the matter is approved . . ."

Consul Reineck to Secretary Kellogg, no. 159, Feb. 23, 1928, MS. Department of State, file 702.05/92; Assistant Secretary Carr to Mr. Reineck, Mar. 26, 1928, *ibid.* 702.05/94.

The Department of Justice, in 1909, requested the assistance of the Department of State in obtaining testimony of a clerk in the French Consulate at New York city, in a criminal prosecution instituted by the United States. The French Ambassador, at the request of the Department of State, granted permission for the taking of the testimony of the clerk. The Acting Attorney General (Ellis) to the Secretary of State (Knox), Apr. 12, 1909, and Mr. Knox to Ambassador Jusserand, Apr. 14, 1909, MS. Department of State, file 18998; Mr. Jusserand to Mr. Knox, Apr. 17, 1909, *ibid.* 18998/1.

Treaty with
Germany,
1923

With reference to the question of obtaining the testimony of a German consular officer before a Federal grand jury, the Department of State, in May 1938, said:

You will note from the following extracts from Article XVIII of the Treaty of Friendship, Commerce and Consular Rights concluded on December 8, 1923 between the United States and Germany, that the right to arrest consular officers is limited, and that it is provided that their attendance as witnesses at a trial may be demanded by the prosecution or defense. It might be held, should the question arise, that their presence at a grand jury proceeding cannot be required. In view of this it seems to me that you will make an effort to have the Consul General appear before the grand jury only in the event of believing that his testimony is essential, and that, should you regard it as essential, you will either see him in person and request him to attend or write him a courteous note making that request.

[Quoting first two paragraphs of Article XVIII of the above-mentioned treaty (4 Treaties, etc. [Trenwith, 1938] 4199).]

The Counselor of the Department of State (Moore) to Lamar Hardy, May 27, 1938, MS. Department of State, file 702.05/279A.

In a criminal proceeding in Italy involving the fatal shooting of one American seaman by another, the American Consul, who had taken the affidavits of witnesses, was asked, under article IV of the consular convention of 1878 between the United States and Italy (1 Treaties, etc. [Malloy, 1910] 978), to appear and testify. The article provides:

Italian
treaty, 1878

Consular officers, citizens of the state which appointed them, and who are not engaged in trade, professional business or any kind of manufactures, shall not be obliged to appear as witnesses before the courts of the country in which they reside. If their testimony should be necessary, they shall be requested in writing to appear in court, and in case of impediment their written deposition shall be requested, or it shall be received *viva voce* at their residence or office.

In all the criminal cases contemplated by the VIth article of the amendments of the Constitution of the United States, by virtue of which the right is guaranteed to persons charged with crimes, of obtaining witnesses in their favor, consular officers shall be required to appear, all possible regard being paid to their dignity and to the duties of their office.

Consuls of the United States in Italy shall receive the same treatment in similar cases.

The Department instructed the Consul to give copies of the affidavits to the defense and to testify as to the taking of them but not as to the facts of the case or the contents of the affidavits. Later he reported that he had been asked to testify as to what he had heard from members of the crew concerning certain facts of the case. The Department replied that "If subpoenaed you may appear as a witness and endeavor to confine your testimony to your knowledge of the facts".

The Consul at Palermo, Italy (Nester), to the Secretary of State (Hull), telegram of Jan. 30, 1935, and Mr. Hull to Mr. Nester, telegram of Jan. 31, 1935, MS. Department of State, file 195.8 DeMott, Martin/26; Mr. Nester to Mr. Hull, telegram of Apr. 23, 1935, and Mr. Hull to Mr. Nester, telegram of Apr. 25, 1935, *ibid.* 195.8 DeMott, Martin/32.

The Department of Justice in a letter of December 1915 to the Department of State expressed the view that under the sixth amendment to the Constitution, providing that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with witnesses against him", article III of the consular convention of 1870 between the United States and Austria-Hungary exempting consuls from being summoned to appear as witnesses, except when necessary

In criminal
cases

for the defense of a person charged with crime (1 Treaties, etc. [Malloy, 1910] 40), must be interpreted as permitting the Government as well as the defendant to summon consuls in criminal prosecutions. The Department of State entertained a different view. It stated that—

the following points seem to be clear: (1) that Article III of the treaty with Austria-Hungary in explicit terms exempts consular officers of the contracting parties who are citizens of the country which appoints them, from appearing before the courts, *except when their testimony may be necessary for the defence of persons charged with crime*; (2) that the provisions of this article are similar to other treaty stipulations which confer exemption of this nature on consular officers, and (3) that in stipulating for a qualification of such exemption in certain cases this Government has undertaken to avoid a conflict with the sixth amendment of the Constitution.

In view of these facts, and in view of the fact that, had it been intended by the framers of the treaty that consular officers should not be exempted from process in criminal cases, it would have been natural to employ concise and specific language to this effect in the treaty, as could easily have been done, it would seem that the terms of the treaty should be given a literal construction, and that they should, therefore, be interpreted as preventing consular officers of Austria-Hungary in this country from being summoned into court by the prosecution in a criminal case.

I beg further to call your attention to the fact that in Article XI of the Treaty with Austria-Hungary is a favored nation clause conferring on consular officers of the contracting parties "all the liberties, prerogatives, immunities and privileges granted to functionaries of the same class of the most favored nation". Under this Article Austria-Hungary would doubtless feel warranted in invoking any of the benefits of the treaty provisions in relation to the exemption of consular officers to which I have called attention.

The Assistant Attorney General (Warren) to the Counselor for the Department of State (Polk), Dec. 15, 1915, and Mr. Polk to Mr. Warren, Jan. 11, 1916, MS. Department of State, file 711.6321/79½.

Interference with duties

In 1916 the American Consul at Newcastle, Australia, was requested to appear in police court to testify in a minor case. He explained that he was busy with official duties. The court thereupon issued a summons requiring his immediate appearance and, as a result of obeying the summons and the consequent interference with his official duties, the sailing of an American vessel was delayed for a full day. The Consul reported that, prior to the issuance of the summons, the accused in the case had pleaded guilty. The Department instructed the Ambassador to Great Britain to bring the facts of the case to the attention of the British Foreign Office and to point out that—

international practice concedes to consular officers such privileges and immunities as are necessary to enable them properly to discharge the duties of their office and that peremptory summonses such as complained of by the Consul at Newcastle do not seem to accord with such international practice.

The British Foreign Office expressed the regret of both the British Government and the Government of New South Wales at any inconvenience caused the Consul and gave assurances that no discourtesy was intended.

Consul Sullivan to Secretary Lansing, no. 72, Aug. 21, 1916, and the Second Assistant Secretary of State (Adce) to the Ambassador in Great Britain (Page), no. 4328, Oct. 17, 1916, MS. Department of State, file 702.07/1; Mr. Page to Mr. Lansing, no. 6319, May 30, 1917, *ibid.* 702.07/2.

With reference to paragraph 3, article 2, of the consular convention of February 23, 1853 between France and the United States, the Department of State said that—

the principal reason for exempting consular officers by the Treaty from attendance in person as witnesses in court is to avoid interference with or interruption of the business of the consulate which might result if the consular officer was obliged to leave the consulate to testify in court. In matters of this kind, therefore, a consular officer, while observing proper vigilance to avoid waiving any important right or privilege to which he may be entitled by treaty or otherwise, should cooperate in every proper way with the local authorities in the interest of the administration of justice in the country of his official residence.

Your action in declining to appear in court in person as a witness in the case mentioned in your despatch, while at the same time offering to make an oral statement at the Consulate or to furnish a written statement of the information in your possession concerning the case, is in harmony with the treaty provision above quoted and meets with the Department's approval.

The Director of the Consular Service (Carr) to the Consul at Tananarive, Madagascar (Carter), July 22, 1922, MS. Department of State, file 123C24/100.

In December 1935 the American Consul in Colombo, Ceylon, reported that he had been served with a summons to appear as a witness in a case involving an automobile accident, that the trial was at a town some miles distant, and that his attendance necessitated an interference with his official duties. In an instruction of January 28, 1936 to the Embassy in London, the Department of State said:

In view of the minor nature of the case and the importance of having consular officers at their posts, it is believed that steps should be taken to assure that in the future an American consular officer in a British Colony shall be exempt from being

summoned as a witness except in cases involving crime and that in no case shall he be summoned as a witness in a civil suit if to do so will cause serious interference with his official duties. The present contrary practice appears to be based upon instructions from the Secretary of State for the Colonies. You will therefore take up this matter with the Foreign Office with a view to ascertaining whether the present instructions on this subject will be modified so as to avoid a repetition of the present case. You may state that so far as this Department is advised it is not customary for a court in the United States to summon a British consular officer in this country to give testimony in civil cases arising at a considerable distance, such as twenty-five miles from his place of business. If for any reason a British consular officer were served with a summons under such circumstances, it is believed that if he appealed to the local authorities to be excused from appearing in response to it they would take steps with a view to having him excused from appearance and if his testimony was necessary they would arrange to have it taken in writing at his office or his residence.

The Embassy was advised by the Foreign Office that the attention of the local officials in Ceylon had been drawn "to the necessity for taking all possible steps to avoid causing unnecessary inconvenience to a consular officer who is called upon to give evidence, and that magistrates have been instructed to consider the possibility of taking evidence on commission in all cases in which application is made for the issue of a summons for the appearance of a consular officer as a witness in a Court at a distance from his office".

Consul Buell to Secretary Hull, no. 424, Dec. 17, 1935, MS. Department of State, file 123B862/171; Assistant Secretary Carr to Mr. Buell, Jan. 28, 1936, *ibid.* 123B802/178; Mr. Carr to the Chargé d'Affaires ad interim in Great Britain (Atherton), no. 1105, Jan. 28, 1936, *ibid.* 123B862/177; the British Foreign Office to the American Ambassador in Great Britain (Bingham), Aug. 1, 1936 (enclosure in despatch 2424 from the First Secretary of Embassy (Johnson) to Mr. Hull, Aug. 6, 1936), *ibid.* 123B862/205.

**Official
communi-
cations**

The American Consul General at Sydney, Australia, was requested to appear and testify before a royal commission concerning certain cable communications which he had sent to the Commissioner of Immigration at San Francisco, whereupon the Department of State sent a communication to the British Chargé d'Affaires ad interim in Washington in which it stated:

I need scarcely remind you that international practice concedes to consular officers such privileges and immunities as are necessary to enable them properly to discharge the duties of their office. In this relation it is believed that you will agree that the Consul General should not be compelled to testify regarding his communication with this Government, much less to produce such confiden-

tial communications before the Commission and that there was a breach of propriety in requesting him so to do.

The Embassy was of the opinion that the Consul General had not been called as a witness nor had he been compelled to testify regarding his official communications and that the action of the Sydney authorities had merely amounted to a request.

Consul General Brittain to Secretary Lansing, no. 1150, Aug. 24, 1918, and the Acting Secretary of State (Polk) to the British Chargé d'Affaires ad interim (Barclay), no. 332, Dec. 7, 1918, MS. Department of State, file 125.8956/26; the British Ambassador (Reading) to the Acting Secretary of State (Phillips), no. 248, Apr. 2, 1919, *ibid.* 125.8956/28.

The American Consul at Santiago de Cuba informed the Department of State that a judge had "called upon" him to appear in court and give testimony relative to a criminal investigation and that he had declined to do so on the ground that the information was obtained in the course of official business. The Department approved the action of the Consul, stating:

. . . Your information regarding the proposed sale of the steamer appears to have been obtained in your official capacity in connection with your efforts to assist the crew of the steamer to collect the wages which were due them.

There is no treaty provision in force between the United States and Cuba which bears upon the question of the giving of testimony in legal proceedings by consular officers, but it is a generally recognized principle that such officers cannot be summoned to give evidence concerning matters of their consular business, nor to divulge information coming to them in their official capacity.

Consul Clum to Secretary Hughes, no. 340, Nov. 20, 1922, and the Director of the Consular Service (Carr) to Mr. Clum, Dec. 7, 1922, MS. Department of State, file 123C62/96.

In an action of libel in the Supreme Court of the District of Columbia based upon newspaper accounts to the effect that an American citizen had been detained in Mexico on charges of having conspired in his own kidnapping, the defendant's attorney applied to the Department of State for authority to obtain the deposition of an American Consul General in Mexico as to whether the plaintiff had requested his assistance in having an order of detention lifted and also as to his personal knowledge concerning the detention. The Department stated:

With respect to facts which came to the knowledge of the Consul General in his official capacity, the Department, in accordance with the practice which has obtained in regard to such matters, must decline to authorize the Consul General to testify.

However, the Department would have no objection to his testifying regarding facts which he learned in his unofficial capacity, but is not informed that any such facts are within the knowledge of the Consul General.

Wilton J. Lambert to Secretary Hughes, Nov. 6, 1924, and Mr. Hughes to Mr. Lambert, Nov. 7, 1924, MS. Department of State, file 312.1111 Bielaski, Bruce A.

The American Consul General in London was summoned to appear in court to testify in a divorce proceeding as to the visa application of one of the parties. He refused to accept the summons and later declined a request that he appear voluntarily, stating that the archives of the Consulate were confidential. In response to a later request, he assigned a member of the consular staff to appear for the purpose of identifying his signature on certain correspondence. In response to further requests for his testimony he stated that he could comply only on instructions from the Department of State. The Department of State approved his action and, in response to his request for instructions for future guidance, said:

There are, as you know, no treaty provisions in force between the United States and Great Britain having any bearing on this matter. In the absence of treaty provisions, under general principles of international law, consular officers have a right to claim exemption not only from producing official archives, but also from giving testimony in respect to official consular business. A consular officer cannot be required to divulge information which came to him in his official capacity, for that is the exclusive property of his Government; but as to matters which come within his knowledge or observation in his mere capacity as an individual, he is not privileged from testifying as a witness.

Consul General Davis to Secretary Stimson, no. 1148, Jan. 30, 1930, MS. Department of State, file 123D2012/122; the Acting Secretary of State to Consul General Halstead, Feb. 27, 1930, *ibid.* 123D2912/126. To similar effect, see Assistant Secretary Wright to J. M. Mullen, May 11, 1925, MS. Department of State, file 702.6211/448.

An American Consul informed the Department of State in 1935 of the presence, in the consular files, of documents tending to prove the ownership in certain parties of a tract of real property in the United States. He stated that the original deed, which had not been recorded, was lost and that he anticipated being called upon to testify as to his knowledge of the matter and to produce in court the documents in the consular archives. The Department informed him that he should decline to supply copies of the documents for the following reasons—

(1) that the questions asked by American consular officers of applicants for immigration visas are for the purposes of the en-

forcement of the immigration laws only; (2) that the answers are made to consular officers in their official capacity and . . . it is contrary to the well-established practice to furnish information concerning such answers for use in a private litigation in the absence of specific authorization from the party submitting the information concerned; and (3) that testimony in respect of such matters, if given by an American consular officer would constitute an interference with the performance of the consular officer's official duties.

In respect of your or Mr. Payne's testifying as to the existence of the deed (whether valid or otherwise) mentioned by you, it should be stated that, as a general rule, the Department disapproves of consular officers testifying, in private litigation, to anything which may have come to their knowledge in their official capacity. If, however, the Department should receive from the court where a case, such as that contemplated by you, is pending a request that the consular officer concerned be permitted to testify, the Department will be glad to give consideration to the matter of issuing to him appropriate instructions, upon receiving a list of interrogatories that are to be proposed to the officer.

Consul Bickers to Secretary Hull, no. 139, Aug. 9, 1935, and Assistant Secretary Carr to Mr. Bickers, Aug. 19, 1935, MS. Department of State, file 125.5486/41. To the same effect, see Mr. Carr to the Consul General at Vancouver (Davis), no. 353, June 5, 1935, *ibid.* 811.111 Granat, George H. W.; the Chief of the Division of Foreign Service Administration (Hengstler) to Frank W. Senneff, Sept. 3, 1935, *ibid.* 125.5486/42.

An American Vice Consul in Mexico was summoned in 1935 by Mexican judicial authorities to appear and testify in litigation involving American citizens. The Consul General at Mexico City informed the Department that the Vice Consul's own knowledge of the matter was obtained in his official capacity and was furthermore of public record in Mexico City. The Department expressed the view that the Vice Consul was not required to give the testimony, stating that—

he is exempt from furnishing his testimony in the matter under the provisions of the first sentence of Article 16 of the Habana Convention of February 20, 1928 [4 Treaties, etc. (Trenwith, 1938) 4740], to which both the United States and Mexico are parties. Inasmuch as Mr. Minor's testimony, if given, would not further the ends of justice, you will be guided accordingly.

The provision referred to reads: "Consuls are not subject to local jurisdiction for acts done in their official character and within the scope of their authority."

Consul General Bowman to Secretary Hull, no. 615, May 20, 1935, MS. Department of State, file 312.1121 Chapin, Mary A./4; Assistant Secretary Carr to Mr. Bowman, June 1, 1935, *ibid.* 312.1121 Chapin, Mary A./5.

An American Consul in a foreign country was requested by an American attorney to assist in obtaining a deposition of a member of his office concerning an interview with an American citizen who had requested assistance. The testimony was desired in connection with divorce proceedings. The Consul replied that the information which had been furnished the Consulate and the action subsequently taken must be considered as official business and therefore of a confidential nature and that the matter was being submitted to the Department of State. The Department approved the statement but informed the American attorney that in the interest of justice, and upon receiving a list of proposed interrogatories and a statement from a competent court that the testimony was necessary, the request would be given favorable consideration.

Consul Seltzer to Secretary Hull (with enclosure), no. 482, Oct. 21, 1935, and Assistant Secretary Carr to Mr. Seltzer, Nov. 14, 1935, MS. Department of State, file 081.32/102.

In December 1935 an American consular officer in Canada informed the Department of State that a clerk in a consulate had been summoned to appear in court to testify concerning details of a conversation with a visa applicant. The American Legation at Ottawa was instructed to bring the case to the attention of the appropriate authorities with a view to having the court advised of the immunity of consular personnel from giving testimony regarding information received in an official capacity, as well as the contents of the consulate archives. The clerk was excused from testifying.

The American Consul at Moncton, Canada, to Secretary Hull, telegram of Dec. 16, 1935, and Mr. Hull to the American Minister in Canada (Armour), telegram 147, Dec. 17, 1935, MS. Department of State, file 125-6173/77; the American Consul at St. John (Von Tresckow) to Mr. Hull, no. 23, Dec. 18, 1935, *ibid.* 125.6173/80.

Inviolability of archives

While a Consul has no personal immunity from being called as a witness, the Consul can not be required to testify as to the contents of the consular archives nor as to information which has come to him in his official capacity. . . .

With reference to the subpoenas duces tecum . . . left at the Consulate, you should . . . inform the appropriate authorities that in conformity with international practice the officials of your consulate are exempt from producing evidence from the archives of the consulate and from giving testimony concerning information which has come to them in their official capacity. You will add that, as the only information concerning the case which has come to the attention of the members of your consulate came to them in their official capacity, they must decline to testify in the case.

Consul General Palmer to Secretary Stimson, no. 222, May 16, 1930, MS. Department of State, file 242.11 Sieman, Jack/82; Assistant Secretary

Carr to Mr. Palmer, June 27, 1930, *ibid.* 242.11 Sieman, Jack/99. To similar effect, see Mr. Carr to the Consul General at Montreal (Frost), June 25, 1930, *ibid.* 123F02/231.

In October 1935 a subpoena *duces tecum* was served on a clerk of the Consulate at Malta by the Civil Court of Malta requiring him to appear as a witness in an action involving the refusal of the Consulate to visa a passport. The Department of State instructed the Embassy in London to call the matter to the attention of the British Foreign Office with a view to having the subpoena withdrawn and, in doing so, said:

... It is a generally recognized rule of international law, that consular officers cannot be summoned to produce to the court any part of the official consular archives, nor to give evidence concerning facts coming to them in their official capacity, and this rule applies with equal force with respect to other employees attached in an official capacity to the Consulate. You may inform the Foreign Office, however, that the American Consul at Malta or clerk Engerer or both may, upon receipt of an appropriate request from the court, appear and testify to the fact of the receipt of the visa application and of the refusal of the visa, and cooperate so far as they properly can with the local authorities.

Subsequently the court served a new subpoena "identical with the original except omitting *duces tecum*". The Department stated that in view of the change in the form of the summons and the nature of the case, there was no objection "to Engerer's testifying".

Consul George to Secretary Hull, telegram of Oct. 26, 1935, and Mr. Hull to Ambassador Bingham, telegram 323, Oct. 30, 1935, MS. Department of State, file 150.49B69/11; Mr. George to Mr. Hull, telegram of Nov. 6, 1935, *ibid.* 150.49B69/14; Acting Secretary Phillips to Mr. George, telegram of Nov. 6, 1935, *ibid.* 150.49B69/13. To the same effect, see Assistant Secretary Carr to Consul General Cameron, Nov. 29, 1935, *ibid.* 811.111 Monzon, Ramon.

In connection with the trial of a German subject in Samoa in 1915 by the British Administrator, a question arose as to the production of papers which he had deposited with the American Consulate.

The British Foreign Office took the view that only the official correspondence and archives of a consulate enjoyed immunity and that accordingly private papers deposited with a consular officer could not be given a privileged status. The Department of State shared this view and told the Consul that, if the papers in question were not part of the official German diplomatic or consular archives

which had been deposited with him, he should deliver them upon request to the British Administrator.

Ambassador Page to Secretary Lansing, telegram 3171, Nov. 6, 1915, and Mr. Lansing to the Consul at Apia, Samoa, telegram of Nov. 10, 1915, MS. Department of State, file 362m.62/25.

It will be observed from the foregoing statement that the immunity of a consular officer from the obligation to give testimony in certain instances flows primarily from the general rule of international law with respect to the inviolability of consular archives.

In the case dealt with in your despatch under reference the information concerning which the Court may wish to obtain the testimony of Vice Consul Barbour would not appear to be of the nature which the rule of the inviolability of archives is designed to protect. In fact, it would appear to be information which by its very nature is not a matter of record in the Consulate, but only of record on the certificate of authentication signed by Vice Consul Barbour. In other words, the act about which the Court may desire to question Vice Consul Barbour had for one of its primary purposes the making of public record the fact that the assignees were informed of the contents of the document which they had signed. Under the circumstances it would seem that Vice Consul Barbour should freely testify as to his recollection of the manner in which the notarial act in question was executed.

The Counselor of the Department of State (Moore) to Consul General Morris, May 9, 1935, MS. Department of State, file 125.1513/404.

Permission
to produce
documents

In May 1919 an American Consul in Mexico reported to the Department of State that he contemplated being asked to produce in court, in connection with a criminal prosecution, a copy of an invoice in the consulate archives showing the shipment of certain goods. The Department instructed the Consul that—

since it does not appear that the interests of this Government would be prejudiced thereby, and since the interest of justice would probably be promoted, the Department perceives no objection to your furnishing the desired document. If you pursue this course, you will make it clear to the appropriate authorities that the action taken should not be construed as a precedent, but merely as a waiver of the right of immunity in this particular case, in view of all the circumstances.

Moreover, you are directed, in the first instance, to respond to any request for the production of the document, by tactfully suggesting to the authorities any other source from which the desired evidence may be obtained, waiving your immunity only

when it appears that reasonable efforts to obtain the document elsewhere have failed.

The Director of the Consular Service (Carr) to Consul Marsh, no. 224, May 5, 1919, MS. Department of State, file 812.404/219.

In 1932 an American Consul in Germany reported that a commission and interrogatories had been addressed by a New York court to a party in Germany for the taking of the Consul's testimony with reference to a visa matter, the testimony being desired in connection with probate proceedings. The Department informed the Consul of its position that such records are confidential but stated that an exception might be made in that case in the interest of justice. It was added that, in as much as certified copies of the documents could be transmitted to the Department for possible communication to the New York court, he was not to testify in Germany. Vice Consul Gray to Secretary Stimson, no. 675, June 3, 1932, and Assistant Secretary White to Consul General Dominican, Aug. 12, 1932, MS. Department of State, file 125.8856/62.

The Spanish Ambassador in the United States transmitted to the Department of State a document from a Spanish court in the nature of a rogatory letter addressed to the "proper judicial authority at Washington", requesting for use in litigation an authenticated certificate of certain information of a commercial nature contained in the files of the Consulate of the United States at Malaga, Spain. The Department instructed the Consul that—

Although Article 18 of the Treaty concluded July 3, 1902, between the United States and Spain provides that the consular archives shall be at all times inviolable, the Department will, nevertheless, in view of the circumstances of this particular case and the nature of the controversy between the litigants, be pleased to have you certify copies of the Consular records giving the information indicated in paragraph two of the order of the Court and send the certificate promptly to the Department.

The Director of the Consular Service (Carr) to Consul Smith, Feb. 8, 1923, MS. Department of State, file 123Sm53/188.

An American railroad company brought a suit in the courts of Canada based upon an alleged falsification of documents. It desired that a member of the staff of the Consulate General at Montreal should present in court the original of a certain invoice. The Department informed the Consul General that, if a certified copy of the invoice should not be acceptable, he might permit the original invoice to be used on the understanding that it would be returned to his files.

Consul General Lakin to Secretary Kellogg, telegram of July 19, 1927, and Mr. Kellogg to Mr. Lakin, telegram of July 21, 1927, MS. Department of State, file 140.1/255.

In 1933 a request was made of the American Consul General at London for certified copies of invoices to be used as evidence in bankruptcy proceedings

to aid in establishing the ownership of certain goods. The Department of State authorized the Consul to furnish the receiver with the copies and said that "Similar copies of related shipments may be furnished upon request if you are satisfied that fraudulent representations have been made regarding shipments described therein." Consul General Frazer to Secretary Stimson, no. 117, Jan. 12, 1933, and Mr. Stimson to Mr. Frazer, telegram of Feb. 2, 1933, MS. Department of State, file 140.1/377.

In connection with the prosecution in the Canadian courts of a former clerk of an American Consulate in that country for irregularities in the course of his employment the Department instructed the Consul to—

"permit any necessary examination by Canadian authorities of the original records in the Consulate in the presence of a proper American consular official and to produce such records in court in the custody of such American consular official for purposes of identification only with authenticated copies thereof which it may be desired to put in evidence." The Assistant Secretary of State (Carr) to Consul Jackson, Dec. 6, 1933, MS. Department of State, file 125.3895/81; the Comptroller General (McCarl) to the Secretary of State (Hull), Nov. 27, 1933, *ibid.* 125.3895/82.

Regarding a request by the Fukien High Court in China that the American Consul at Foochow make available to the court certain records of the Consulate for use in connection with litigation between two Chinese citizens, the Department saw no objection to permitting the court's representative to examine the original documents at the Consulate or to the Consulate's sending the original documents in the custody of a member of the consular staff to the court for examination. It was also of the view that the Consul might furnish the court with ordinary copies if they would suffice, or with certified copies provided the regular fee was charged. Ambassador Johnson to Secretary Hull, telegram 231, May 6, 1936, and Mr. Hull to Mr. Johnson, telegram 109, May 7, 1936, MS. Department of State, file 125.3856/72.

Witness
as to law

In June 1909 the American Consul at Hong Kong requested permission to testify concerning American immigration laws, at the trial of a suit on a promissory note for which procurement of illegal entry into the United States was the consideration. He was authorized by the Department to testify in his personal capacity, "it being clearly understood that your statements are wholly unofficial and in no wise binding on this government".

Consul Fuller to Secretary Knox, telegram of June 10, 1909, and the Chief Clerk of the Department (Carr) to Mr. Fuller, telegram of June 12, 1909, MS. Department of State, file 19995.

The American Consul General in Liverpool, having appeared under protest in divorce proceedings, was interrogated respecting the acceptance of a marriage certificate as *prima-facie* evidence in courts in the United States. The Department of State instructed the Embassy in London to bring the matter to the attention of the British Foreign Office, stating:

... It is believed ... that such an officer should not be obliged to leave his official duties and be subjected to the embarrassment of being called upon to testify regarding questions

of American law and procedure. So far as the Department is advised it is not customary for courts in the United States to summon British consular officers in this country to give testimony on similar questions arising with respect to the law or procedure in political units of His Majesty's Governments.

The Foreign Office agreed that it was "not proper that such an officer should be called upon compulsorily as an expert witness upon the law of his country".

Consul General Holland to Secretary Hull, no. 979, Feb. 14, 1935, and the Assistant Secretary of State (Carr) to the Chargé d'Affaires ad interim to England (Atherton), no. 738, Mar. 5, 1935, MS. Department of State, file 702.05/202; enclosure in despatch 1947 from the Counselor of Embassy in England (Atherton) to Mr. Hull, Dec. 7, 1935, *ibid.* 702.05/226.

An American Vice Consul in Mexico inquired whether he should appear and testify before a military court, to which the Department of State replied: Before courts martial

In the absence of treaty provisions exempting you from the necessity of testifying or specifying the manner in which your testimony should be received, it would appear that you are liable to respond to a summons made upon you by competent authority and in accordance with Mexican law to testify in a pending suit, whether of a civil or criminal nature.

Under the general rule of international law, however, you may not be summoned to give evidence of matters of consular business or in order to produce to the court any part of the consular archives, and information which came to you in your official capacity you are privileged from disclosing, for such information belongs to this Government. These immunities do not appear to extend to matters coming within the knowledge or observation of a Vice Consul in his capacity as an individual, simply because the facts concerning which he is requested to testify may be of a political character.

The Director of the Consular Service (Carr) to the Vice Consul at Progreso (Young), no. 204, Feb. 28, 1916, MS. Department of State, file 125.7373/62.

In November 1930 the American Vice Consul at Guaymas, Mexico, in compliance with an order received from a military prosecutor, appeared and gave testimony before an investigating body concerning the relation between the Consulate and a military officer during a recent revolution. Subsequently the Department of State instructed the Ambassador in Mexico to address a note to the Mexican Foreign Office, stating:

In view of the circumstances of this case involving as it did a Mexican political matter, and the disclosure of information from the files of the Consulate, my Government is of the opinion that the practice which prevails generally among nations would

have indicated that the Prosecutor should have extended to the Vice Consul an invitation in writing to give testimony, containing a statement as to the purpose of the inquiry and setting forth a date on which the testimony could have been given sufficiently remote so as to afford opportunity for the Vice Consul to have consulted his Government in the premises. . . . if my Government had been so consulted in the instant case, it would in all likelihood have given favorable consideration to the request and authorized the Vice Consul to testify.

The Mexican Foreign Office replied that its conduct was governed by the convention relating to consular agents, signed by both the United States and Mexico in 1928, and that if any irregularity existed in this case it was because it was conducted by local military officials who were unfamiliar with international usage and to whom the consular officer would have been justified in pointing out that their procedure appeared to be at variance with the usual rules governing such cases.

Vice Consul Yepis to Secretary Stimson, no. 114, Nov. 8, 1930, MS. Department of State, file 812.203/1; Mr. Stimson to Ambassador Clark, no. 79, Jan. 27, 1931, *ibid.* 812.203/5; enclosure in despatch 389 from Mr. Clark to Mr. Stimson, Apr. 30, 1931, *ibid.* 812.203/6.

The Department of State, in June 1923, instructed an American Consul in China that, under the law, he was bound to respond to a subpoena issued by United States Naval officials in China requiring him to appear and testify at a court martial. Consul Lupton to Secretary Hughes, telegram of June 27, 1923, and Mr. Hughes to Mr. Lupton, telegram of June 28, 1923, MS. Department of State, file 123L97/148.

In Sept. 1938 United States Naval authorities desired the testimony of the Vice Consul at Colón, Panama, in court-martial proceedings. The Department of State raised no objection but stated that if official acts or records of the Consulate were to be disclosed "detailed information as to nature of testimony or records involved should be telegraphed Department for further consideration". Consul Hall to Secretary Hull, telegram of Sept. 27, 1938, and Mr. Hull to Mr. Hall, telegram of Sept. 29, 1938, MS. Department of State, file 123 Geerken, Forrest K/171.

The Department of State on Apr. 5, 1907 sent the following instructions to the Consul General at Chefoo, China, in regard to the authority of the United States Court for China over consular officers:

"The United States Court for China has in general the same authority over the United States Consul in China in his personal capacity as if he were a private citizen. . . . It is, of course, true that the official duties connected with the position of United States Consul may frequently demand the attention of the Consul. In such cases, this fact should be brought to the attention of the court, which will doubtless show due consideration for the official business and personal convenience of consular officers in taking their testimony. It should be remembered, however, that it is ultimately for the court to determine whether or not a proper excuse exists for the nonattendance of a consular officer at any particular time. See *Hartranft's Appeal*, 85 Pa. 433, *Wigmore on Evidence*, Sec. 2371. Once the Consul has taken the witness stand in response to proper direction of the court, the propriety of his answering any particular question

or producing any particular paper remains to be determined. A large privilege exists for secrets of state and official communications. The exact limits of this privilege have not been very clearly laid down by judicial decisions. It seems clear, however, that the privilege covers all pending international matters of an official character, and this whether the information sought is by way of obtaining copies of the consular records or by direct questions addressed to a consular officer.

"The precise limits of the privilege would seem to be for the court to determine in each particular instance, and unless in case of very exceptional circumstances, where disobedience of the order of the court becomes imperative, the consular officer should, in the absence of specific instructions from the Department, accept the ruling of the court as to whether or not any particular matter is within the scope of the privilege.

"In this connection it should be noted that R.S. 896 [28 U.S.C. §677] provides that 'copies of all official documents and papers in the office of any consul, vice consul, or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States.'

"Inasmuch as ample provision is thus made for obtaining official copies of documents on file at the consulate in all proper cases, and inasmuch as these copies are expressly made admissible in evidence, it would seem that the records themselves should ordinarily not be produced in court. It is not intended absolutely to prohibit the production of official records by consular officers when convenient, but to suggest the undesirability of such action under ordinary circumstances and to point out that the existence of R.S. 896 by providing an adequate method for proving copies of official records would seem to exclude by inference the power of any court to require the production of the original. See Wigmore on Evidence, Sec. 2873."

The Second Assistant Secretary of State (Adee) to the Consul General at Chefoo (Fowler), no. 268, Apr. 5, 1907, MS. Department of State, file 552/64-65.

In 1917 an American consular officer in Brazil received from a United States District Court in New York a document purporting to be a commission for the taking of the testimony of the Consul General relative to his relations with a company involved in litigation. The Consul General transmitted his testimony, in the form of affidavits, to the Department of State which, in a letter of June 1, 1917, stated to the clerk of the court:

"While there was apparently no legal obligation on the part of the Consul General to respond to interrogatories transmitted to him in this seemingly irregular manner, he has . . . prepared certain affidavits in which he undertakes to set forth the facts called for in the interrogatories and cross-interrogatories propounded in this so-called 'commission'. At the suggestion of the Consul General the Department transmits to you herewith copies of these affidavits, which have been sworn to by the Consul General before the Vice Consul at Rio de Janeiro."

At the same time the Department informed the Consul General as follows:

"If in the future you are summoned in a legal way by a Brazilian court of competent jurisdiction to answer inquiries propounded under letters rogatory issuing in a regular manner from a court in the United

States, you should endeavor to give such information as is requested of you. Otherwise, you may, in the event of the receipt by you of requests similar to that in this case, furnish such information as you may deem appropriate either in the form of an extract of the records of your office or of an official statement of the facts of the case. In neither event, however, should you furnish copies of any official communications recorded in your office without specific authorization of the Department." Consul General Gottschalk to Secretary Lansing, no. 771, Apr. 10, 1917; the Second Assistant Secretary of State (Adee) to the Clerk of the District Court of the United States for the Western District of New York (Petrie), June 1, 1917; the Director of the Consular Service (Carr) to Mr. Gottschalk, June 1, 1917: MS. Department of State, file 081.32/5.

TAXATION

§438

In 1932 the Department of State communicated with the Governors of certain States on the subject of taxation of officials of foreign governments residing and holding positions under such foreign governments in those States, stating in part:

It is customary under international practice to grant exemption from taxation to consular officers of other countries on grounds of international comity and reciprocal favor. This has been embodied in numerous conventions and treaties . . . This Government also exempts all foreign consular officers and the employees of foreign consulates in the United States owing allegiance to a foreign government on a reciprocal basis from payment of federal income taxes on the salaries, fees and wages received in compensation for consular services. Exemption to all other employees of foreign governments who are nationals of the state by which they are employed is granted in accordance with the policy of this Government to exempt from taxation the salaries of agents of foreign governments who render services in this country in connection with legitimate governmental activities undertaken by such governments. Foreign consular officers are exempt in the District of Columbia from the payment of personal property taxes on automobiles and other personal property, either tangible or intangible, owned by them, in addition to exemption from Federal income tax. . . .

It is believed that taxation of persons in the categories mentioned by a state or a municipal government in the United States not only would be at variance with the practice now generally adopted in other countries but might subject American officers abroad to similar taxation by foreign countries.

Secretary Stimson to the Governors of certain States, May 23, 1932, MS. Department of State, file 702.0611/444A.

Article XIX of the treaty of friendship, commerce, and consular rights of 1923 between the United States and Germany, 4 Treaties, etc. (Trenwith, 1938) 4199, provides:

"Consular officers, including employees in a consulate, nationals of the State by which they are appointed other than those engaged in private occupations for gain within the State where they exercise their functions shall be exempt from all taxes, National, State, Provincial and Municipal, levied upon their persons or upon their property, except taxes levied on account of the possession or ownership of immovable property situated in, or income derived from property of any kind situated or belonging within the territories of the State within which they exercise their functions. All consular officers and employees, nationals of the State appointing them shall be exempt from the payment of taxes on the salary, fees or wages received by them in compensation for their consular services."

A similar provision has been adopted in various other agreements entered into by the United States. Of like import is article 20 of the Habana convention of 1928 regarding consular agents. *Ibid.* 4741.

An inquiry from the Mexican Ambassador in Washington concerning the taxation by the United States of consular telegraph and telephone messages was referred by the Department of State to the Treasury Department, which said in reply:

... the General Counsel of the Treasury Department, under date of August 14, 1940, held that as a matter of international law one sovereign may not levy a tax on the transaction of governmental functions by a foreign sovereign government where the tax or its direct burden will fall upon that government. This Department has, therefore, departed from its former policy, and a distinction must now be made between official telephone and telegraph messages, and services, and those of unofficial character.

Official
business

The Mexican Ambassador (Nájera) to the Secretary of State (Hull), Sept. 24, 1940, and the Assistant Secretary of State (Long) to the Secretary of the Treasury (Morgenthau), Oct. 10, 1940, MS. Department of State, file 702.1211 Taxation/64; the Acting Secretary of the Treasury (Gaston) to Mr. Hull, Feb. 21, 1941, *ibid.* /68; the Assistant Secretary of State (Berle) to Señor Nájera, Mar. 7, 1941, *ibid.* /64.

The Internal Revenue Code of February 10, 1939, provides:

SEC. 116

... The following items shall not be included in gross income and shall be exempt from taxation under this title:

(h) ...—Wages, fees, or salary of an employee of a foreign government (including a consular or other officer, or a nondiplomatic representative) received as compensation for official services to such government—

Taxation
of income

(A) If such employee is not a citizen of the United States; and

(B) If the services are of a character similar to those performed by employees of the Government of the United States in foreign countries; and

(C) If the foreign government whose employee is claiming exemption grants an equivalent exemption to employees of the Government of the United States performing similar services in such foreign country.

53 Stat. 50; 28 U.S.C. §116(h). The provision appeared originally as an amendment to the Revenue Act of 1934 (49 Stat. 908) and was included in the Revenue Acts of 1936 (49 Stat. 1691) and 1938 (52 Stat. 500).

The Department of State in 1913 transmitted to the Treasury Department an inquiry from the British Embassy as to the position of the United States concerning the exemption of consular officers from the operation of the income-tax law. The Treasury Department replied:

"A tax upon their official salaries or fees would be a tax upon the instrumentality of the powers which they represent. It appears that it is the general rule of all Governments to exempt from taxation the agencies of other Governments necessary to carry into effect and secure diplomatic and commercial relations between the nations of the world.

"Replying, therefore, specifically to your inquiry, you are informed that the income of consular officers derived from their salaries or fees, or from investments outside of the United States, is exempt from the income tax."

The Assistant Secretary of State (Osborne) to the Secretary of the Treasury (McAdoo), Nov. 29, 1913, MS. Department of State, file 811.5123/11; Mr. McAdoo to the Secretary of State (Bryan), Dec. 6, 1913, *ibid.* 811.5123/18. This ruling was reaffirmed in a letter of the Acting Secretary of the Treasury to the Secretary of State (Lansing), Apr. 20, 1918, *ibid.* 702.0611/97.

Article 83 of Regulations 45 (1920 ed.) Relating to the Income Tax and War Profits and Excess Profits Tax Under the Revenue Act of 1918 provided:

"... The income of foreign ambassadors and ministers from investments in bonds and stocks and from interest on bank balances, and the fees of foreign consuls, are exempt from tax, but income of such foreign officials from any business carried on by them in the United States would be taxable. The compensation of citizens of the United States who are officers or employees of a foreign Government is, however, not exempt from tax."

A provision to the same effect was included in article 86 of Regulations 62 Relating to the ... Revenue Act of 1921.

In a letter from the Treasury Department to the Department of State, dated Mar. 25, 1919, it was said:

"Consuls and Consuls General as such have no immunity from taxation by reason of their employment by foreign governments, and in regard to tax liability are subject to the same rules as other individuals. It may be added that the salaries of persons recognized by the State Department as having a diplomatic status ... are exempt by reason of their diplomatic status, under international comity. Consular officers as such do not have such status.

"The Revenue Act ... applies to the entire income of citizens and residents of the United States, and to the income of nonresident aliens, so far as such income is derived from sources within the United States."

Reference was made to Treasury Decision 2794, 21 T.D. (Internal Revenue, 1919) 38, defining "residence" and "nonresidence", and it was said:

"... Under one of the provisions of that Treasury Decision, a Consul who comes to the United States for the purpose of occupying a particular Consular post for a definite period set out in the order appointing him, and who has the intention of returning to his native country at the expiration of such definite time, unless the appointment should be renewed, is a non-resident, but except under the particular facts here outlined, the question as to whether he is a resident or nonresident would be subject to the general provisions therein set forth. Certainly if he definitely intended to make his home in the United States, or if he was without intention to return at once as soon as his period of office expired, he would be regarded as a resident."

The Department of State, in replying on July 18 of that year, pointed out that under this decision a considerable number of foreign consuls might be regarded as alien residents of this country and therefore subject to taxation on any part of their incomes except their fees. The opinion was expressed that "in the matter of the taxation of consuls there does exist a policy of international comity, which, to a certain extent, should relieve consular officers from the burden of taxation." The Department referred to treaty provisions exempting consuls from such taxation and to precedents collected in V Moore's Digest 86 *et seq.* In suggesting that the Treasury Department modify its ruling, it was urged that "reciprocal comity appears to be the basis of any exemption of taxation extended to consuls, whether such exemption is definitely fixed by treaty or depends upon a policy of international practice". In its reply of July 30, 1919 the Treasury Department stated:

"... An alien who represents a foreign country in the capacity of a consular officer, although physically located within the United States, would not be classified as a resident alien. His status for income tax purposes would be that of a nonresident alien, and inasmuch as nonresident aliens are only subject to tax with respect to income derived from sources within the United States, such consular officers would be subject to tax only with respect to income derived from sources within the United States, exclusive of income received in their official capacity."

The Assistant Secretary of the Treasury (Shouse) to the Acting Secretary of State, Mar. 25, 1919, and the Assistant Secretary of State (Phillips) to the Secretary of the Treasury (Glass), July 18, 1919, MS. Department of State, file 702.0611/22; Mr. Shouse to Secretary Lansing, July 30, 1919, *ibid.* 702.0611/28.

In a letter of May 21, 1923 the Treasury Department said:

"It is held by the Department that the place where personal services are rendered is the source of income regardless of the residence or character of the payer, of the place in which the contract for services was made or of the place of payment. The exemption from taxation of Canadian Immigration officers who are stationed in the United States has not been on the ground that the compensation of such persons is income from sources without the United States . . . Such exemption has been in accordance with the policy of the Department to exempt from taxation the salaries of agents of foreign governments who render services in this country in connection with legitimate governmental activities undertaken by such governments." The Acting Assistant Secretary of the Treasury (Platt) to the Secretary of State (Hughes), May 21, 1923, MS. Department of State, file 702.0642/5.

In a letter of Sept. 11, 1922 to the Department of State, the Treasury Department said:

"... Article 86 of Regulations 62 provides that the fees of a foreign consul are exempt from income tax. The term 'consul' as used in this article includes consular officers but does not include employees of the foreign consulates. Alien employees of foreign consulates in the United States are liable to Federal income tax on compensation received for services rendered to the consulate."

This statement was reaffirmed in a letter from the Treasury Department, dated Apr. 26, 1923, and it was added that—

"... it has been the policy of this Department to exempt from taxation the salaries of the agents of the instrumentalities of foreign governments for services rendered in the United States in connection with legitimate governmental activities undertaken by such governments.

"Under these rulings the compensation of a citizen of the United States who is employed in any capacity at a foreign legation or embassy at this capital or a foreign consulate in this country is not exempt from tax whether such American citizen is a member of the diplomatic suite of a foreign ambassador or minister or a consular officer of a foreign country, while the compensation of a citizen of a third nationality who is a member of the diplomatic suite or a consular officer would be exempt from tax."

Thereafter, on June 20, 1923, the Department of State requested that the Treasury Department consider modifying its ruling so as to extend the exemption to consular employees as well as to consular officers. It was also requested that the exemption be confined to officers and employees nationals of the state appointing them, and that it be extended only on the basis of reciprocity. In its reply of July 9, following, the Treasury Department adopted these suggestions, except as to the condition of reciprocity. As the result of further representations by the Department of State, this condition was agreed to in subsequent correspondence.

The Assistant Secretary of the Treasury (Clifford) to the Secretary of State (Hughes), Sept. 11, 1922, MS. Department of State, file 702.0656/7; the Assistant Secretary of the Treasury (Moss) to Mr. Hughes, Apr. 26, 1923, and the Under Secretary of State (Phillips) to the Secretary of the Treasury (Mellon), June 20, 1923, *ibid.* 701.0611/231; Mr. Moss to Mr. Hughes, July 9, 1923, and the Third Assistant Secretary of State (Wright) to Mr. Mellon, Nov. 7, 1923, *ibid.* 701.0611/235; Mr. Moss to Mr. Hughes, Nov. 20, 1923, *ibid.* 702.0611/93; the Assistant Secretary of the Treasury (Wadsworth) to Mr. Hughes, Apr. 7, 1924, and Mr. Hughes to Mr. Mellon, May 5, 1924, *ibid.* 702.0611/122; the Acting Secretary of the Treasury to Mr. Hughes, July 18, 1924, *ibid.* 702.0611/132.

Article 86 of Regulations 65 Relating to ... the Revenue Act of 1924 accordingly contained the following provision:

"All foreign consular officers and employees in foreign consulates in the United States who are nationals of the States appointing them are exempt from Federal income tax with respect to the wages, fees, and salaries received by them in compensation for their consular services, provided the appointing State grants a similar exemption to citizens of the United States who are American consular officers or employees of the American consulates in such State. The income received by foreign consular officers and employees of foreign consulates from investments in the United States in bonds and stocks and from interest on bank balances

as well as income from any business carried on by them in the United States is subject to Federal income tax."

Similar provisions were included in article 86 of Regulations 69, article 641 of Regulations 74, article 641 of Regulations 77, and article 116-1 of Regulations 86, relating to the Revenue Acts of 1926, 1928, 1932, and 1934, respectively.

In replying on Mar. 20, 1934 to an inquiry from the Department of State as to the exemption of official representatives of the Chilean Government in the United States, the Treasury Department, after referring to article 641 of Regulations 77, said:

"Official representatives of foreign governments in the United States not in a diplomatic or consular character are not entitled to exemption from the Federal income tax under international law and are subject to the tax, irrespective of the character of the services they perform, in the absence of statutory or treaty provisions granting exemption therefrom."

The Assistant Secretary of State (Carr) to the Acting Secretary of the Treasury, Dec. 21, 1933, MS. Department of State, file 701.0611/444; the Acting Secretary of the Treasury (Gibbons) to the Secretary of State (Hull), Mar. 20, 1934, *ibid.* 701.0611/464.

In a letter of May 10, 1934 the Treasury Department affirmed the above view, pointing out that it marked a departure from earlier practice. The Department of State requested that the decision be reconsidered and stated that it presumed that no change was contemplated in article 641 of Regulations 77. The Treasury Department replied on Aug. 7, 1934, reaffirming the above ruling and stating that its extension to include consular officers was contemplated. Referring to existing practice it stated:

"... Under the practice thus established the exemption in question has been granted not as a matter of right under any recognized principle of international law, Act of Congress, or treaty provision, but solely as a matter of administrative policy, and, for the reasons already stated, the practice is one which, however meritorious from the standpoint of administrative policy or expediency, is now regarded by this Department as indefensible from the standpoint of the law. . . .

"Unless Congress or the treaty-making authorities declare such policy, it cannot be assumed to be the policy of the United States to grant exemptions from taxation on the basis of reciprocity. . . .

"The formulation of such policies is not within the province of the executive department of the government.

"You refer particularly to rulings of this Department which classify official representatives of foreign governments in the United States for Federal income tax purposes as resident and nonresident aliens. In this connection you are advised that there has been no change in the practice of this Department in classifying as nonresident aliens foreign consular officers or other nondiplomatic representatives of foreign governments in the United States engaged in carrying on legitimate governmental activities undertaken by such foreign governments. The change of policy evidenced by this Department in the letters of March 20, 1934, and May 10, 1934, has the effect of subjecting to Federal income tax the income of such individuals from sources within the United States consisting of compensation for services rendered in the United States, which, under the pre-

existing practice, had been exempted from the tax. Under the law gross income from sources within the United States includes compensation for labor or personal services performed within the United States regardless of the residence of the payor, or the place in which the contract for services was made, or of the place of payment."

In replying on Sept. 6, 1934 the Department of State said that the proposed ruling probably would adversely affect American consular personnel abroad and asked that the action be deferred until the matter could be presented to Congress. The Treasury Department concurred, and the action undertaken by the two Departments led to the enactment of §116(h) of the Revenue Act of 1934 (*ante*, p. 775).

The Secretary of the Treasury (Morgenthau) to the Secretary of State (Hull), May 10, 1934, and Mr. Hull to Mr. Morgenthau, June 20, 1934, MS. Department of State, file 102.02 Taxation/79; Mr. Morgenthau to Mr. Hull, Aug. 7, 1934, and the Acting Secretary of State (Moore) to Mr. Morgenthau, Sept. 6, 1934, *ibid.* 102.02 Taxation/80.

Article 116-1 of Regulations 94 and article 116-1 of Regulations 101, relating respectively to the Revenue Acts of 1936 and 1938, contain the following provision:

"... The income received by employees of foreign governments (other than ambassadors, ministers and members of their households including secretaries, attachés and servants) from sources other than their salaries, fees, or wages, referred to above, is subject to Federal income tax. The compensation of citizens of the United States who are officers or employees of a foreign government is not exempt from income tax."

On
private
income

With respect to the proposed taxation of an American Consul in Great Britain on private income derived from sources within the United States, a memorandum was prepared by the Office of the Solicitor for the Department of State, in 1909, in which it was said, after reviewing precedents:

In the absence, then, of a treaty provision with Great Britain, it is not seen that the Government of that country is under any legal obligation to exempt our consular officers from the payment of a tax upon their private incomes, even if derived from property situated in the United States.

The Department instructed the Ambassador in Great Britain informally to request of the British Government that "upon the grounds of international comity and reciprocal favor, it extend the present exemption from the income tax of the official incomes of foreign consuls so as to include the private income of American consular officers derived from property located outside the United Kingdom". The British Foreign Office declined to grant an extension.

Secretary Knox to Ambassador Reid, no. 972, Apr. 21, 1909, and memorandum of the Solicitor for the Department of State, Mar. 1, 1909, MS. Department of State, file 16545/4; the Embassy in Great Britain to Mr. Knox, no. 945, June 17, 1909, *ibid.* 16545/8.

In 1923 a demand was made on the American Consul in Madras, India, by the Madras corporation, for the payment of a professional tax based

upon his official salary. The Department of State instructed him to decline to pay the tax and, at the same time, instructed the Ambassador in London to bring the matter to the attention of the British Foreign Office in an endeavor to secure exemption on the grounds of international comity and reciprocal favor. The Consul subsequently reported to the Department that the British Government did not desire to take any action to prevent the collection of the tax and that it appeared that British authorities believed that British consular officers were required to pay similar taxes in various parts of the United States. In May 1925 the Department instructed the Ambassador in London to inform the Foreign Office that consular officers in the United States were taxed only on investments made and property owned in the United States and that such taxes could not be considered a precedent for the collection of taxes on the official incomes of consular officers. The Ambassador was further instructed to state that "it appears to be the practice now generally adopted in other countries to exempt foreign consular officers, nationals of the country appointing them, from the payment of taxes on the incomes received and the compensation paid them for the performance of their official duties". The Embassy reported in February 1926 that it had received a report that, pending further consideration, the taxes in question were, as a special case, being paid *ex gratia* by the Government of Madras to the corporation on behalf of the officers without prejudice to any of the general questions involved. Consul Doolittle to Secretary Hughes, no. 280, Aug. 27, 1923; Acting Secretary Phillips to Mr. Doolittle, telegram of Oct. 10, 1923; Assistant Secretary Harrison to Ambassador Harvey, no. 984, Oct. 11, 1923; MS. Department of State, file 702.0645/8. The Vice Consul in Madras (Case) to Mr. Hughes, no. 129, Sept. 24, 1924, *ibid.* 702.0645/10; Mr. Harrison to Ambassador Houghton, no. 12, May 13, 1925, *ibid.* 702.0645/11; the American Embassy in London to Secretary Kellogg, telegram 26, Feb. 10, 1926, *ibid.* 702.0645/20.

In 1930 an American consular officer in Great Britain was requested to make an income-tax return of all income except official emoluments. The Department instructed the Ambassador:

"Under existing regulations in the United States, the British consular officers assigned to this country are regarded as non-resident aliens by the Bureau of Internal Revenue and are accordingly taxed upon only that portion of their income which is derived from sources within the United States (see Income Tax Regulations 74, Article 641). You are directed to bring this matter to the attention of the Foreign Office, taking care to emphasize the fact that in requesting relief from the United Kingdom's income tax for American consular officers, this Government desires such relief to apply only to such portion of their non-official income as is derived from sources outside of the United Kingdom, on a basis of reciprocity."

The Foreign Office advised that under British law no change was possible. This position was maintained throughout ensuing discussions, which continued over a period of several years. In the final note on the subject, however, the British Government emphasized that a consul's liability "so far as concerns income from sources outside the United Kingdom, *would be on only such part of that income as is received in or remitted to the United Kingdom*".

Counselor of Embassy (Atherton) to the Secretary of State (Stimson), no. 610, Jan. 28, 1930, and Assistant Secretary Castle to Ambassador Dawes, no. 458, Aug. 1, 1930, MS. Department of State, file 702.0641/61; the First

Secretary of Embassy (Cox) to Mr. Stimson (with enclosures), no. 1317, Oct. 22, 1930, *ibid.* 702.0641/65; Mr. Atherton to Mr. Stimson (with enclosures), no. 2307, Oct. 8, 1931, and Assistant Secretary Carr to Mr. Atherton, no. 1015, Dec. 3, 1931, *ibid.* 702.0641/68; Mr. Atherton to Mr. Stimson (with enclosure), no. 123, May 31, 1932, and Mr. Carr to Mr. Atherton, no. 147, July 28, 1932, *ibid.* 702.0641/69; Mr. Atherton to Secretary Hull (with enclosures), nos. 747 and 144, Mar. 21 and Aug. 9, 1933, *ibid.* 702.0641/73, /81.

. . . The income received by foreign consular officers and employees of foreign consulates from investments in the United States in bonds and stocks and from interest on bank balances as well as income from any business carried on by them in the United States is subject to Federal income tax.

The Assistant Secretary of State (White) to the Peruvian Ambassador (Freyre), May 25, 1932, MS. Department of State, file 701FE&CC/25.

The American Ambassador in France, in December 1921, transmitted to the Department of State correspondence with the French Foreign Office concerning the levying of income tax upon interest earned by the personal funds of an American consular officer on deposit in a French bank. The Foreign Office had pointed out that the tax applied only to those having their domicile in France or who were in business there and, accordingly, did not apply to diplomatic officers, and that, since consular officers were considered to be domiciled in France, the funds in question were not entitled to exemption unless they belonged to the Government of the United States. The Department, on July 14, 1922, instructed the Ambassador:

The conclusion has, however, been reached that it is inadvisable to request that the Consul be exempted from the payment of the taxes in question under Article II of the Consular Convention with France of 1853 [1 Treaties, etc. (Malloy, 1910) 529] providing in part for the exemption of American consular officers in France from the payment of direct and personal taxes . . .

It was added that the Treasury Department was willing, in view of the above treaty provision, to exempt French Consuls not citizens or engaged in business in the United States from such taxation on personal bank accounts, on the basis of reciprocity, and the Ambassador was instructed to approach the French authorities in this regard. He reported in December 1922 that the French Government had expressed its unwillingness to consider the proposal.

Ambassador Herrick to Secretary Hughes (with enclosures), no. 989, Dec. 16, 1921, MS. Department of State, file 702.0651/6; the Director of the Consular Service (Carr) to Mr. Herrick, no. 387, July 14, 1922, *ibid.* 702.0651/7; Mr. Herrick to Mr. Hughes (with enclosures), no. 2712, Dec. 22, 1922, *ibid.* 702.0651/17.

In reply to an inquiry from an American Consulate in Japan as to whether Japanese employees and American clerks at the Consulate

were liable for the payment of Japanese income tax on salaries received from the United States, the Department, in May 1923, said that it knew of no international practice upon which exemption could be claimed and that the matter, in the absence of a treaty, was governed by Japanese law.

The American Consulate at Nagasaki to Secretary Hughes, telegram of May 11, 1923, and Mr. Hughes to the Consulate, telegram of May 18, 1923, MS. Department of State, file 894.5123/41.

In reply to a despatch of February 1933 from an American Consul in Turkey relating to the payment of taxes assessed by the Turkish Government against salaries received from the United States by the foreign staff of the Consulate and suggesting an allotment for this purpose, the Department of State said that—

any tax imposed by Turkish Government on salaries if paid is for payment by the employee and is not proper charge against the Government of the United States or payable from appropriated funds. If you are making such payments you should discontinue immediately. Attempt to collect such taxes from your office would be in the nature of taxation of the Government of the United States and therefore cannot be approved.

The Department said further:

Aside from the question of the availability of funds for this purpose this Government cannot recognize any liability for its payment, directly or indirectly, of taxes or contributions for social security or other purposes imposed by a foreign government.

Consul George to Secretary Stimson, no. 28, Feb. 21, 1933; Acting Secretary Moore to Consul Lewis, telegram of Dec. 11, 1936; Assistant Secretary Carr to Mr. Lewis, Dec. 14, 1936: MS. Department of State, file 125.8734/244.

In the absence of applicable treaty provisions, taxes on real or personal property of foreign consuls in the several states of the United States are subject to regulation by the states in which the consuls are stationed. There is no treaty between the United States and Great Britain relating to this subject.

**Real
property
taxes**

The Legal Adviser of the Department of State (Hackworth) to Frank H. Thompson, Nov. 24, 1931, MS. Department of State, file 702.4111/1194.

As a result of the Department's investigation it seems safe to say that if taxes are levied and collected upon consular premises owned by the Imperial Japanese Government in Honolulu, such property is but receiving the same treatment as would

be accorded similar property owned by any Government, within American territory.

The Third Assistant Secretary of State (Wilson) to the Second Secretary of the Japanese Embassy (Hanihara), July 25, 1907, MS Department of State, file 7827.

The American Consul General in London protested, in 1922, against the payment of property taxes on the property occupied by the Consulate General. The lease of the premises stipulated for the payment of these taxes by the lessee, but the Consul General was of the opinion that payment would involve unfair discrimination by reason of the fact that a Russian trade delegation, which was said to perform consular functions, was accorded exemption. The Department of State pointed out that British officers did not enjoy such exemption in the United States, although the taxes were probably paid indirectly as part of the rent, and that—

With respect to the special considerations granted to the Soviet delegates . . . the United States does not have a consular convention with Great Britain providing that American consular officers shall receive most favored nation treatment.

Since the Government of the United States is not in a position to exempt premises that may be occupied by British consular offices in this country from the payment of state and municipal taxes and thereby reduce the rental of such premises paid by the British Government, the Department considers that it would be improper to ask the British Foreign Office to grant American consular officers a favor for which it cannot grant the same equivalent to British consular officers in the United States.

Consul General Skinner to Secretary Hughes, no. 13027, May 5, 1922, MS. Department of State, file 702 0641/37; Mr. Skinner to Mr. Hughes, no. 14625, Feb. 21, 1923, and the Director of the Consular Service (Carr) to Mr. Skinner, Mar. 23, 1923, *ibid.* 702.0641/47.

Treaty exemptions

With reference to the intended purchase by the Italian Government of a building in New York city for use as a consulate general, the Italian Chargé d'Affaires in the United States inquired of the Department of State whether this transaction, as well as the building in question, would be exempt from taxation by virtue of article 19 of the treaty of 1923 between the United States and Germany (4 Treaties. etc. [Trenwith, 1938] 4199) and applicable most-favored-nation provisions in the treaty between the United States and Italy. The reply was as follows:

The most favored nation clause referred to in the above quoted article would seem to relate to the privileges of consular officers but not to the specific privileges conferred by the above quoted provision of the treaty between the United States and Germany.

I should add, moreover, that even if it should be conceded that by a broad interpretation the most favored nation clause contained in Article 17 could embrace within its provisions the above quoted clause of Article 19, in the estimation of this Government, the benefits of this clause could only be invoked by your Government on a basis of reciprocity.

The Italian Embassy to Secretary Stimson, July 14, 1930, and the Assistant Secretary of State (Castle) to the Italian Chargé d'Affaires ad interim (Marchetti), Aug. 8, 1930, MS. Department of State, file 702.6511/741.

In 1935 officials of Norfolk, Virginia, raised a question as to liability of foreign consular officers to municipal taxes on tangible personal property owned by them and located within the city. The Department of State referred to article XV of the treaty of friendship and general relations of July 3, 1902 between the United States and Spain (2 Treaties, etc. [Malloy, 1910] 1705) exempting consular officers of the two countries, who are citizens or subjects of the country which they represent, "from all National, State, Provincial and Municipal taxes except on real estate situated in, or capital invested in the country to which they are commissioned", and stated that consular officers of countries possessing appropriate most-favored-nation treaties with the United States were entitled, on a reciprocal basis, to this exemption.

The Assistant City Attorney of Norfolk, Virginia (Old) to the Secretary of State (Hull), Nov. 8, 1935, and the Acting Legal Adviser of the Department of State (Baker) to Mr. Old, Nov. 18, 1935, MS. Department of State, file 702.06/290.

In 1914 an American consular officer in Wales complained that a tax had been assessed against him by local borough authorities. He stated that the tax seemed to be a "poor rate" and to be based on the rental value of his official residence. He was informed by the Department that—

Rental
taxes

In the absence of any treaty between the United States and Great Britain exempting consuls from the taxes assessed against you by a Local Government Board, and the British Government being apparently unwilling to exempt you from these taxes as a matter of comity, there does not appear to be any ground on which you may properly claim exemption from the taxes.

Consul Livingston to Secretary Bryan, no. 50, June 16, 1914, and the Director of the Consular Service (Carr) to Mr. Livingston, no. 33, July 16, 1914, MS. Department of State, file 702.0641/5.

The question having again arisen in 1920, the Department, in declining to take any steps in the matter, pointed out that British officers in the United States might, in effect, pay the same tax, even though it was nominally collected from the owner of the premises. Consul General Skinner to Sec-

retary Colby, no. 9640, May 26, 1920, and the Director of the Consular Service (Carr) to Mr. Skinner, July 24, 1920, *ibid.* 702.0641/18.

In a despatch of March 1925 an American consular officer proposed that efforts be made to secure exemption from the German rental tax on premises occupied by American consular officers. The Consul contended that, when such taxes were assessed against property and added to the rental of the premises, they amounted to a personal tax on the Consul, from which he should be exempt under applicable treaty provisions. The Department of State informed him that it was unnecessary to decide whether such a tax was in fact a direct tax imposed upon the Consul and added:

. . . however, your attention is drawn to the fact that this Government has always considered that luxury taxes are taxes imposed upon the seller of a commodity and has constantly refused to exempt foreign diplomatic officers in this country from paying the amount of such tax, although such taxes necessarily must be taken into account when the price of a commodity is fixed, and in many instances is doubtless set forth in the bill rendered by the vendor at the time of purchase.

After quoting article XIX of the treaty of friendship, commerce, and consular rights concluded in 1923 between the United States and Germany (4 Treaties, etc. [Trenwith, 1938] 4199) the Department said:

It will be observed from the foregoing provisions that taxes levied on consular officers on account of the possession of real estate is [*are*] expressly excepted from the general exemption of taxation granted to such officers. It would appear, therefore, that the rental tax assessed by the German local authorities at Leipzig, even if directly imposed upon the American Consul at that place on account of his possession of real estate, would be permissible under this Article. It will be observed moreover, that only buildings *owned* by foreign governments are exempt from taxation and that therefore should this Government lease property for use as a chancery or consular offices in Germany, it would not be exempt from taxation under the new Treaty.

The American Consul in charge at Berlin (Davis) to the Secretary of State (Kellogg), no. 2137, Mar. 7, 1925, and the Under Secretary of State (Grew) to the Chargé d'Affaires ad interim in Berlin (Robbins), no. 3803, Apr. 9, 1925, MS. Department of State, file 702.0662/24. The Department's instructions of June 1930 and April 1933 reaffirmed the above position. The Assistant Secretary of State (Carr) to the Ambassador in Germany (Sackett), no. 95, June 2, 1930, *ibid.* 702.06/256; Mr. Carr to the Consul General at Berlin (Messersmith), Apr. 18, 1933, *ibid.* 702.0662/69.

... the jurisdiction of the Transvaal authorities over the estate of Mr. Bray [a deceased American consular officer] and the collection of an inheritance tax upon it would seem to be legally unimpeachable. The account was voluntarily placed by Mr. Bray within the jurisdiction of the Transvaal authorities, probably for business or personal convenience. No immunity from the local inheritance tax and local administration proceedings attached to it because of its ownership by an American Consul in his private capacity at the time of his decease. Neither principle of international law nor provision of treaty deprives the local authorities of their jurisdiction to impose the local inheritance tax upon such property and to subject it to the local proceeding of administration.

Estate and
inheritance
taxes

The Director of the Consular Service (Carr) to W. P. Crawford, Jan. 6, 1919, MS. Department of State, file 123B73/103.

In reply to a despatch from the American Consul General in London stating that an estate duty had been levied upon the estate of an American consular officer deceased in Scotland, the Department of State in Jan. 1921 advised that according to information received from the Treasury Department "should a British consular officer die in the United States while serving in his official capacity, all real or personal property which he owned on the date of death and which, on that date, was actually in this country, would be subject to the American Estate Tax Law". The instruction continued: "It is therefore impossible for the Department to assist in procuring relief for the estate of Mr. Fleming." Consul General Skinner to Secretary Colby, no. 10475, Nov. 22, 1920, MS. Department of State, file 702.0641/23; the Director of the Consular Service (Carr) to Mr. Skinner, Jan. 7, 1921, *ibid.* 702.0641/24.

In Apr. 1923 the Norwegian Minister in Washington informed the Department of State that he had been advised that inheritance taxes would be collected against the estate in New York of a Norwegian consular officer, a subject of Norway, who had died in that country after spending many years as a consular officer in New York. The Minister requested exemption from this tax and stated that exemption would be granted by the Norwegian Government in similar circumstances. The Department transmitted the request to Federal and New York State officials and later transmitted their replies to the Minister to the effect that there was no provision under either the Federal or State laws by which the exemption could be granted. The Minister of Norway to Secretary Hughes, Apr. 26, 1923; the Second Assistant Secretary of State (Adee) to the Secretary of the Treasury (Mellon), May 16, 1923; Mr. Hughes to the Governor of New York (Smith), May 17, 1923; MS. Department of State, file 702.0611/78. The Assistant Secretary of the Treasury (Moss) to Mr. Hughes, May 23, 1923, *ibid.* 702.0611/79; the President of the New York State Tax Commission (Gilchrist) to Mr. Hughes, May 29, 1923, and the Under Secretary of State (Phillips) to the Chargé d'Affaires ad interim of Norway (Steen), June 29, 1923, *ibid.* 702.0611/88.

Turn-over and luxury taxes were assessed by the German Government on the sale of an automobile by an American consular officer

Excise taxes

in that country. The Department of State pointed out that there was no treaty provision covering the sale and added:

A communication *concerning luxury and sales taxes* as they affect diplomatic representatives of foreign governments in this country has been received from the Treasury Department, which states that where these taxes apply directly to the individual it is held that the tax does not attach in cases of sales to ambassadors, ministers and diplomatic representatives of foreign governments properly accredited to the Government of the United States, but that the exemption referred to *does not, in the absence of applicable treaty provisions, apply to consular officers.*

In view of this statement of the Treasury Department and of the fact that there are no appropriate treaty provisions bearing on the matter, the Department does not consider that it can properly object to the payment by American consular officers in Germany of luxury and sales taxes.

Consul General Coffin to Secretary Hughes, no. 1050, Aug. 21, 1923, and the Director of the Consular Service (Carr) to Mr. Coffin, Sept. 27, 1923, MS. Department of State, file 702.0662/8. The Department reiterated this view in an instruction of Sept. 9, 1925 to the Ambassador in Germany. The Under Secretary of State (Grew) to Ambassador Schurman, no. 74, Sept. 9, 1925, *ibid.* 702.0662/30.

Diplomatic officers are exempted from the stamp tax on passage tickets but this exemption does not extend to consular officers in the absence of treaty provisions granting such exemption.

The Assistant Secretary of State (White) to the Ambassador of Peru (Freyre), May 25, 1932, MS. Department of State, file 701FE&CC/25. See also the Assistant Secretary of the Treasury (Moss) to the Secretary of State (Hughes), June 27, 1924, *ibid.* 702.0611/128; the Secretary of the Treasury (Mellon) to the Secretary of State (Stimson), Nov. 18, 1931, *ibid.* 701.0611/379; the Department of State to the Czechoslovak Legation in Washington, Mar. 20, 1934, *ibid.* 702.60f11/174.

The Japanese Embassy in Washington, in Oct. 1932, inquired whether chancellors in Japanese Consulates were to be considered among those officials entitled to exemption from taxes on telegraph, telephone, radio, and cable facilities and on checks. It was pointed out that chancellors were government officers occupying a different status from that of clerks. The Department of State, after consulting with the Treasury Department, replied:

"... Consular officers and employees may have exemption from the excise taxes under consideration only to the extent that such exemption may be conferred by treaty. . . . The only members of the consular staff enumerated in the Treaty as having the right to enjoy the exemption are consuls general, consuls, vice consuls, deputy consuls, and consular agents. Inasmuch as consular chancellors are not included among those specifically designated as entitled to the exemption, they seem clearly not within the purview of the exemption thus granted."

The Japanese Embassy to the Department of State, no. 120, Oct. 24, 1932, MS. Department of State, file 702.9411/446 ½; the Secretary of the Treasury (Mills) to the Secretary of State (Stimson), Feb. 8, 1933, and the Depart-

ment of State to the Japanese Embassy, Mar. 7, 1933, *ibid.* 702.9411/452. See also the Swedish Minister (Boström) to the Assistant Secretary of State (Carr), May 10, 1933, and Mr. Carr to Mr. Boström, June 7, 1933, *ibid.* 702.5811/413.

In response to an inquiry from an attorney as to whether a foreign consular officer in California was subject to the State sales tax when the State authorities claimed that the tax was on the seller rather than on the purchaser, the Department of State, in December 1933, stated that foreign consular officers were "not exempt from taxes of this character unless specific provision therefor is contained in treaties in force between the United States and the Government by which the consular officer is accredited".

The Legal Adviser of the Department of State (Hackworth) to Jerome Poltzer, Dec. 27, 1933, MS. Department of State, file 702.0611/554.

In 1938 the Department of State was informed by the Honduran Legation that the Honduran Consul General at New York had been required to pay a Federal excise tax on the purchase of an automobile. The Legation expressed the view that under the treaty of friendship, commerce, and consular rights between the United States and Honduras of December 7, 1927 the Consul should be exempt from the tax. After consulting with the Treasury Department, the following reply was made:

Under the provisions of existing treaty agreements in effect between the United States and Honduras, consular officers of Honduras are exempt from the payment of the excise taxes imposed by Title IV of the Revenue Act of 1932, including the tax on automobiles. However, such an exemption is restricted in its application to instances where the consular officers involved are parties to the transaction to which the tax attaches. In other words, such consular officers may properly claim an exemption from tax with respect to automobiles purchased by them direct from the manufacturer thereof, but where purchases are made from some one other than the manufacturer this exemption does not apply, for the reason that the tax attaches to sales by the manufacturer and any inclusion of such an amount by another person is considered rather to be the addition by him of an item of business expense.

The Honduran Legation to the Department of State, Dec. 9, 1938; the Counselor of the Department of State (Moore) to the Secretary of the Treasury (Morgenthau), Dec. 22, 1938; the Department of State to the Honduran Legation, Feb. 17, 1939: MS. Department of State, file 702.1511 Taxation/16.

The Department of State in October 1934 replied as follows to a despatch from the American Consul General at Paris stating that

a French tax on motor vehicles had been suppressed and a tax on gasoline substituted :

It is believed that foreign consular officers in the United States generally pay the tax on gasoline. In some instances where the tax is assessed upon the consumer, it has been held that, where treaty provides for the exemption of consular officers from taxes, they are not obliged to pay the gasoline tax.

Inasmuch as this Government is not in position to grant reciprocal exemption from gasoline tax to foreign consular officers in the United States, it is not deemed feasible to request the French Government to grant exemption to American officers in France.

The Assistant Secretary of State (Carr) to the Consul General at Paris (Keena), Oct. 15, 1934, MS. Department of State, file 702.0651/71.

In 1934 the Mexican Embassy inquired whether Mexican consular officers in the United States were exempt from the Federal tax on gasoline. It was advised :

Article 20 of the convention concluded at Habana [in 1928, 4 Treaties, etc. (Trenwith, 1938) 4741] relative to consular agents provides that consular agents . . . shall be exempt from all national, state, provincial, or municipal taxes levied upon their person or property. It will be noted that the taxes from which consular agents and employees are exempted under the provisions of the consular convention are the "taxes levied upon their person or property." The exemption is thus limited in its application to personal taxes and property taxes. . . .

Section 617(a) of the Revenue Act of 1932, as amended, provides for a tax on gasoline "sold by the importer thereof or by a producer of gasoline." Thus the Federal tax on gasoline is not a tax on the person or property of consular agents and employees but is an excise on the sale of gasoline. It is the opinion of this Department, therefore, that the tax exemption accorded consular agents and employees under the consular convention with Mexico of February 20, 1928, is without application to the Federal excise tax on gasoline.

The Chief of the Division of Mexican Affairs (Reed) to the Second Secretary of the Mexican Embassy (Vázquez-Treserra), May 8, 1934, MS. Department of State, file 702.0611/599.

The Mexican Ambassador in Washington pointed out to the Department of State in 1940 that his Government had exempted American consular offices from the tax on electricity consumption "undoubtedly guided by the opinion that, although the tax in question was a tax on consumption, an *excise tax*, this latter is included within the terms of" article 20 of the Habana convention. 4 Treaties, etc. (Trenwith, 1938) 4741, and see *ante*, p. 775. The Ambassador

asked for a ruling as to taxation by the United States of consular telegraph and telephone communications, which he said were of a similar nature. An inquiry was submitted to the Treasury Department, which said:

It is the view of this Department that the clear intent of treaty provisions which accord to consular officers and employees of foreign consulates exemption from taxes "levied upon their person or property" is to limit the exemption to direct taxes, as for example, a capitation tax or a tax on the ownership of property, real or personal. Your particular attention is invited to the letter of this Department to you under date of November 13, 1936, in reply to your letter of July 9, 1936 . . . wherein the provisions of Article 20 of the Consular Convention of February 20, 1928, were construed. It was there held that the taxes contemplated by the phrase "levied upon their person or property" were limited to direct taxes and the distinction between direct taxes and indirect taxes, or consumption or turnover taxes, which it has been necessary to draw in the administration of the various revenue acts, was clearly set forth. As indicated in that ruling, it is necessary to interpret the phrase in question as a limitation of the exemption in order that it may be given some effect. Inasmuch as all taxes, of whatever character, whether direct or indirect, inevitably fall upon either person or property, an interpretation of the provisions as contended for by the Mexican Ambassador would render the phrase "levied upon their person or property" as surplusage and of no force or effect.

Ambassador Nájera to Secretary Hull, Sept. 24, 1940, and Assistant Secretary Long to the Secretary of the Treasury (Morgenthau), Oct. 10, 1940, MS. Department of State, file 702.1211 Taxation/64; the Acting Secretary of the Treasury (Gaston) to Mr. Hull, Feb. 21, 1941, *ibid.* /68; Assistant Secretary Berle to Señor Nájera, Mar. 7, 1941, *ibid.* /64. For the Treasury Department's letter of Nov. 13, 1936 above referred to, see the Acting Secretary of the Treasury (Taylor) to Mr. Hull, *ibid.* 702.0611/748.

The Department of State, in 1926, transmitted to the Treasury Department a despatch from the American Consul General in Berlin from which it appeared that German authorities had sought to collect internal taxes from American consular officers in Germany on articles imported by them free of duty under article XXVII of the treaty of friendship, commerce, and consular rights concluded between the United States and Germany in 1923. 4 Treaties, etc. (Trenwith, 1938) 4202. The Treasury Department, after discussing the question, concluded:

Internal
taxes on
duty-free
goods

This Department is inclined to the view and, unless given another interpretation by you, will apply the rule that the exemption provided in Article XIX of the German-American treaty in question, does not extend exemption from indirect, excise, consumption or turnover taxes. The Department believes that the taxes

just mentioned are not taxes "levied upon their persons or upon their property", within the meaning of Article XIX of the aforementioned treaty.

The Treasury Department also said:

Effect of
most-favored-
nation treaty

However, Article XVII of the Treaty provides that consular officers of each of the contracting parties shall enjoy all the rights, privileges, exemptions and immunities accorded like officers of the most favored nation and in a letter from your Department of June 14, 1923, relative to the exemption of Swedish consular officers from the tax on telegraph and telephone messages (So-811.512/388), construing a similar provision in Article II of the Consular Convention between the United States and Sweden of June 1, 1910, the view was expressed that since under Article XV of the Treaty of Friendship and General Relations between the United States and Spain of July 3, 1902, consular officers of Spain were exempt from the tax a similar exemption might properly be accorded consular officers of Sweden. Applying this principle to the question here presented, it would seem to follow that under the most favored nation provision in Article XVII of the Treaty with Germany consular officers of Germany are entitled to exemption from excise taxes on articles imported by them free of duty under Article XXVII thereof, provided, in each instance request for the exemption is made by your Department.

Consul General Coffin to Secretary Kellogg, May 8, 1926, and Mr. Kellogg to the Secretary of the Treasury (Mellon), June 19, 1926, MS. Department of State, file 702.0662/33; the Acting Secretary of the Treasury (Mills) to Mr. Kellogg, Sept. 6, 1927, *ibid.* 702.0662/34.

The provision in the treaty between the United States and Spain referred to above reads: "consular officers, citizens or subjects of the country which has appointed them . . . shall also be exempt from all National, State, Provincial and Municipal taxes except on real estate situated in, or capital invested in the country to which they are commissioned." 2 Treaties, etc. (Malloy, 1910) 1705.

In 1936, in considering the consular convention concluded at Habana in 1923 between the United States and other American republics, which contains an article (XX) similar to article XIX of the convention of 1923 between the United States and Germany referred to above, but which contains no most-favored-nation clause, the Treasury Department reaffirmed the position above set forth. The Acting Secretary of the Treasury (Taylor) to the Secretary of State (Hull), Feb. 19, 1936, MS. Department of State, file 702.0611/722½.

In reply to an inquiry as to whether an internal-revenue tax imposed upon tobacco imported by an Egyptian Consul in the United States for his personal use had been properly collected, the Department of State said:

"No Consular Convention has been concluded between the United States and Egypt. . . . The reciprocal arrangement between the United States and Egypt, permitting consular officers to import goods free of duty for their personal use, does not apply to internal revenue taxes on such goods when they are imported." The Legal Adviser of the Department of State (Hackworth) to W. S. Culbertson, June 25, 1935, MS. Department of State, file 702.8311/54.

By an act approved May 9, 1941 a new provision was inserted in the Internal Revenue Code numbered section 3802, reading as follows: Statute,
1941

... No internal-revenue tax shall be imposed with respect to articles imported by a consular officer of a foreign state or by an employee of a consulate of a foreign state whether such articles accompany the officer or employee to his post in the United States, its insular possessions, or the Panama Canal Zone, or are imported by him at any time during the exercise of his functions therein, if—

(1) such officer or employee is a national of the state appointing him and not engaged in any profession, business, or trade within the territory specified in subsection (a);

(2) the articles are imported by the officer or employee for his personal or official use; and

(3) the foreign state grants an equivalent exemption to corresponding officers or employees of the Government of the United States stationed in such foreign state.

(b) CERTIFICATE BY SECRETARY OF STATE. . . .

55 Stat. 184.

With reference to a report from an American Consul General in Guatemala that a fine had been imposed on his office for failing to make official communications on stamped paper, the Department of State, in Oct. 1912, gave the following instructions:

"The imposition of this tax in connection with the official correspondence of our Consular Officer, who has been received by the Guatemalan Government as the representative of this Government, is regarded by this Department as violative of the rules of international comity. It is not taxation of our Consular Officer but taxation of this Government in relation to the official correspondence of its representative with the Guatemalan authorities. The requirement of the law that the Consul in corresponding with local Guatemalan officials shall use a certain kind of stamped revenue paper instead of the stationery furnished by the Department, would seem to be an interference with the convenient performance by the Consular Officer of his official duties, at variance with what is believed to be the established custom of civilized nations."

In Apr. 1913 the Department was informed that the fine had been revoked but that it had been held that stamped paper for communications to the courts should be paid for by those in whose interests the Consul General was acting. Consul General Bucklin to Secretary Knox, no. 281, Sept. 10, 1912, MS. Department of State, file 711.1421/7; the Acting Secretary of State (Adee) to the Chargé d'Affaires in Guatemala (Wilson), no. 182, Oct. 19, 1912, *ibid.* 711.1421/8; Mr. Wilson to Secretary Bryan, no. 417, Apr. 15, 1913, *ibid.* 711.1421/15.

In 1924 an American Consul in Mexico reported to the Department of State that he had been fined for failure to attach Mexican revenue stamps on a communication which he had made to the collector of customs at the request of an American citizen. The Department informed the Consul that the Mexican law apparently required the stamps on any official document, whether or not issued by an official, that he was not

obliged to transmit the document in question, and that his action in doing so seemed to make him liable. It pointed out that there was no treaty warranting refusal to pay the tax and that "It can hardly be contended that the tax requirement in any way restricts you in the performance of your consular duties, and unless non-payment of the tax is warranted by local custom, of which the Department is not informed, or discrimination against your office, . . . the non-payment of the tax in the circumstances could not be sustained as a matter of right." Consul Stewart to Secretary Hughes, no. 745, Nov. 19, 1924, and the Under Secretary of State (Grew) to Mr. Stewart, Dec. 13, 1924, MS. Department of State, file 612.1121/-.

With reference to a report from an American Consul in Colombia that his official communications to the collector of customs had remained unanswered because they were not submitted on official stamped paper, the Department of State, on Nov. 27, 1928, instructed the Chargé d'Affaires to Colombia to—

"Invite the attention of the Foreign Office at Bogota to the circumstances surrounding the complaint of the Consulate at Santa Marta informing it that in the view of this Government American consular officers in Colombia should be privileged generally to address local authorities directly in behalf of American nationals, as provided by Article III of the Treaty of 1850, without purchasing revenue paper for the purpose and request that the appropriate steps be taken to instruct the Collector of Customs at Santa Marta accordingly."

In an earlier instruction of July 10, 1928 in regard to the matter, the Department had said that a distinction should be drawn between inquiries relating to official shipments of the United States Government and those of private commercial firms and that an exemption should not be claimed in matters relating to private shipments merely because the claim was filed by a consular officer. The Minister in Colombia inquired of the Department in Jan. 1929 whether the instruction of Nov. 27, 1928 superseded that of July 10 and was told to be guided by the distinctions contained in the instruction of Nov. 27, 1928.

The Assistant Secretary of State (Johnson) to the Vice Consul at Santa Marta (Cotie), July 10, 1928, MS. Department of State, file 711.2121/7; the Assistant Secretary of State (White) to the Chargé d'Affaires in Colombia (Matthews), Nov. 27, 1928, *ibid.* 711.2121/10; Minister Caffery to Secretary Kellogg, no. 58, Jan. 3, 1929, *ibid.* 711.2121/11; Mr. White to Mr. Caffery, no. 23, Feb. 11, 1929, *ibid.* 711.2121/12.

Radio receivers

In 1932 the Italian Government imposed a so-called "operating" tax on radio sets owned by American consular officers in Italy. It maintained that the tax was proper as it was not a "national, state, or municipal tax imposed upon persons", as provided by article 3 of the consular convention of 1878 between the United States and Italy. 1 Treaties, etc. (Malloy, 1910) 978. The Department of State took the position that, if the tax was imposed for the rendering of some service by the Italian Government such as providing radio programs, it was not perceived that the treaty provision mentioned was applicable, that taxes imposed on a service provided by the state are uniformly considered as not assimilated to ordinary state or municipal

taxes upon property, and that "Such a tax is considered to be one for a service rendered by the state rather than one imposed upon the mere ownership of property." It added that according to its information there was no taxation of radio-receiving apparatus in the United States either by the State or Federal Governments, and it was suggested that this fact be brought to the attention of the Italian authorities in case further representations in the matter were made.

Ambassador Garrett to Secretary Stimson, no. 1268, Feb. 10, 1932, and Assistant Secretary Bundy to Mr. Garrett, no. 636, May 12, 1932, MS. Department of State, file 702.0665/21. See also correspondence with reference to a similar tax imposed by Germany in 1936. The Assistant Secretary of State (Moore) to the *Chargé d'Affaires ad interim* (Mayer), no. 633, July 14, 1936, *ibid.* 701.0662/23; the Acting Secretary of State (Carr) to Ambassador Dodd, no. 687, Oct. 31, 1936, *ibid.* 701.0662/25.

In a letter of September 5, 1907 the Attorney General brought to the attention of the Department of State a claim by the German Consul at Denver, Colorado, for exemption from the payment of a hunting-license fee, invoking as the grounds for such exemption the provisions of article III of the consular convention of December 11, 1871 between the United States and Germany exempting consular officers "from all direct or personal or sumptuary taxes, duties and contributions, whether Federal, State or municipal". The Department stated that it had never placed upon article III the construction contended for by the Consul and that it was not advised that any such construction had been previously contended for, and added:

Hunting
licenses

The courts of this country appear to have held that the ownership of wild game is in the State or the public, and that the Government may regulate the capture and appropriation of the same. The Wyoming game laws, under this view, may well be regarded as specifying the terms upon which an individual may acquire State or public property. In other words, the license fee may be deemed the consideration fixed by the State for the privilege of appropriating a part of its property, rather than a tax, duty or contribution within the language of Article III of our consular convention with Germany.

The Acting Secretary of State (Adee) to the Attorney General (Bonaparte), Sept. 12, 1907, MS. Department of State, file 8362/2; 1 Treaties, etc. (Malloy, 1910) 551.

Unless treaties with their respective Governments provide for exemption from automobile license and registration fees, the automobiles of foreign consular officers in the United States are considered to be subject to the laws of the various states relating to such charges. There is no treaty between the United States and Great Britain on this subject. Treaties providing for the exemption of the personal property of foreign consular officers in the

Automobile
taxes

United States are in effect with a number of countries throughout the world.

The Under Secretary of State (Clark) to Seth T. Cole, May 15, 1929, MS. Department of State, file 702.4111/1076.

Reciprocity

There are no reciprocal agreements between the United States and other governments dealing only with this subject. Automobile licenses have usually been issued free of charge to foreign consular officers in the United States by the State authorities on account of the provisions in consular conventions concluded with various countries providing, among other things, for the exemption of consular officers not engaged in trade who are citizens of the government they represent from all national, state, or municipal taxes. Such exemption is upon a reciprocal basis requiring issuance of automobile licenses to American consular officers free of charge by the foreign government concerned.

The Legal Adviser of the Department of State (Hackworth) to George Feehan, June 6, 1934, MS. Department of State, file 702.0611/632.

In reply to a despatch stating that an American consular officer in Germany had been required to pay a tax on an automobile which he had imported for his private use, the Department of State, in Sept. 1925, said:

"In the absence of applicable treaty provisions and since the fees and taxes charged foreign consuls in the United States are subject to regulation by the states in which the consuls are stationed, the Department is not disposed to request the German Government to exempt American Consular officers in Germany from the German automobile tax. It is to be understood that the Department's position in this case is based on the fact that it does not consider that the Consular Convention of 1871 is still in force. Upon the coming into force of the Treaty of Friendship, Commerce and Consular rights of December 8, 1923, the Department will of course have to reconsider its views."

In May 1926 following the proclamation of the treaty referred to (4 Treaties, etc. [Trenwith, 1938] 4191), the Department reconsidered this question in an instruction in which it was stated:

"Article 19 of the Treaty of 1923 reads in part as follows:

"'Consular officers . . . shall be exempt from all taxes, National, State, Provincial and Municipal, levied upon their persons or upon their property, except taxes levied on account of the possession or ownership of immovable property situated in, or income derived from property of any kind situated or belonging within the territories of the State within which they exercise their functions.'

"It will be observed that the new Treaty does not limit the exemption of consular officers to *direct* taxes, but that . . . such exemption extends to *all* taxes levied upon their person or upon their property.

"The German authorities, however, now appear to take the position that the tax is not properly speaking a tax on property but rather a tax on the right to use the roads i.e., a license fee. It is the Department's understanding that where a fee is exacted solely or primarily for revenue purposes and payment of a fee gives the right to carry on the business or occupation without the performance of any further conditions, it is not a license fee, but a tax imposed under the power of taxation regardless of

the name by which it may be called. Since it appears that the German automobile tax is levied primarily to provide revenue for the upkeep of the highroads and since in addition to this tax certain license fees are charged for identification plates and driver's permits, the Department considers that the German automobile tax is not a license fee, but properly speaking a tax on the possession of an automobile.

"In view of the foregoing considerations and as foreign consular officers in the District of Columbia are exempt from personal taxation on account of their ownership of automobiles and from the payment of fees for license plates and driver's permits, the Department is of the opinion that American consular officers in Germany should be exempt from taxation on account of their ownership of automobiles under the provisions of Article 19 of the Treaty.

"It may be added that under the foregoing interpretation of the provisions of Article 19 of the treaty of 1923, which the Department is convinced is correct, it would be prepared to uphold the right of the German consular officers to be exempt from taxation throughout the United States on account of their ownership of automobiles."

The German Foreign Office refused to accept the Department's point of view, claiming that the tax was on the act of operating a motor vehicle and, consequently, did not come within the treaty. It indicated that the German laws would permit the granting of the exemption on the basis of reciprocity. The Department expressed regret that the two Governments were unable to reach an agreement on the matter and, while reserving its rights, agreed to the German proposal on condition that it be extended to American employees of the consulates.

The Under Secretary of State (Grew) to the Ambassador in Germany (Schurman), nos. 74 and 574, Sept. 9, 1925, and May 11, 1926, MS. Department of State, file 702.0662/30, /31; Mr. Schurman to Secretary Kellogg, no. 3800, Aug. 10, 1928, *ibid.* 702.0662/47; the Assistant Secretary of State (Castle) to the Chargé d'Affaires ad interim in Germany (Poole), no. 2547, Oct. 22, 1928, *ibid.* 702.0662/48.

"... With respect to the [treaty] provisions exempting consular officers from taxes, the question has frequently arisen whether the exemptions provided for by those provisions include the exemption from the payment of license fees for the ownership or operation of motor vehicles. The Department has not found any authoritative judicial determination of this precise question but the trend of judicial decisions in the United States appears to differentiate between a tax and a charge for a service or a privilege and in this connection reference is made to the following cases decided by the Supreme Court of the United States: *Hendrick v. Maryland*, 235 U.S. 610; *Kane v. New Jersey*, 242 U.S. 160; *Johnson v. Maryland*, 254 U.S. 51. This Department has taken the position in a number of cases submitted for its consideration that the charge for a motor vehicle license is not a tax within the meaning of the treaty provisions mentioned. This position is based on the theory that the amount of the charge is reasonably related to the cost of providing and maintaining the service or privilege and is not imposed primarily for the purpose of raising general revenue. If in a given case, however, it could be established that the amount of the license fee was grossly disproportionate to the cost of establishing and maintaining the service or privilege for which the fee was ostensibly charged and that the amount collected was devoted to general expenditures unrelated to the particular service or

privilege, it would seem that in view of the trend of judicial opinions in the United States it might properly be regarded as a tax and therefore not collectable from a consular officer entitled by treaty to exemption from the payment of taxes.

"The practice of the several states of the United States and of foreign countries with respect to this question is not uniform. Some states and certain foreign countries make no charge to consular officers for automobile licenses while others require consular officers to pay the same fees as are collected from private individuals."

The Acting Solicitor for the Department of State (Baker) to Edward J. Schweid, Apr. 18, 1930, MS. Department of State, file 702/30.

Concerning the obtaining of a free automobile license for an American consular officer in El Salvador on a basis of reciprocity, the Department of State observed:

"Article XVII of the Treaty of Friendship, Commerce and Consular Rights between the United States and El Salvador [of 1926, 4 Treaties, etc. (Trenwith, 1938) 4622] provides that, with certain stated exceptions, consular officers shall be exempt from taxes. However, the Department has been advised by various state authorities in this country that they did not interpret similar provisions contained in other treaties of the United States as covering the matter of fees or charges for automobile and driver's licenses, inasmuch as such fees and charges were not considered to be in the nature of taxes, but rather as license fees imposed for the privilege of using the highways. The Department is inclined to share this view, and, consequently, does not consider that it would be justified in authorizing you to exchange notes with the Salvadoran Government interpreting the exemption provided for in the article mentioned as including free automobile and driver's licenses."

It was suggested, however, that exemption might be obtained on a reciprocal basis if it were ascertained that Salvadoran Consuls in the United States were accorded such exemption by the States in which they resided. The Assistant Secretary of State (White) to the Chargé d'Affaires in El Salvador (Finley), no. 157, May 29, 1931, MS. Department of State, file 123 Latimer, Jr., F.P./72.

... it is not customary in the several States of the Union to grant free registration [of automobiles] to American citizens who may be acting in the capacity of honorary consuls or honorary vice consuls of foreign countries.

The Assistant Secretary of State (Moore) to the Chargé d'Affaires ad interim of Ecuador (Cabeza de Vaca), Dec. 23, 1935, MS. Department of State, file 702.0611/716.

Social-
security
tax

It is stated by the Foreign Office that social insurance in Poland is based upon the general principle of the payment of insurance premiums by the employee and the employer with the reservation that insurance against accidents is exclusively for the account of the employer. The employer is obligated to pay to the insurance institution the full amount of his own and the employee's contribution, but has the right to deduct the employee's share of the contribution at the time of payment of salary.

The employer of the Polish employees in the American diplomatic and consular offices in Poland is the Government of the United States. The Polish Government cannot of course impose upon the Government of another sovereign State any obligation with respect to the payment of social insurance premiums of the nature indicated either on its own account or on behalf of its Polish employees.

The question of whether the Department was authorized, with respect to the Czechoslovak employees in its Legation and Consulates in Czechoslovakia, to pay social insurance premiums of a similar nature stipulated in the laws of Czechoslovakia, was taken up with the Comptroller General, who in reply stated in part that the appropriations under the Department's control are not available for such expenditure. . . .

In the circumstances the Department would not be in a position even voluntarily to observe the provisions of the Polish laws in question regarding the payment of social insurance premiums. Not only would it not be in a position to make payment for the share attributed to employers, but it would be unable to make payment on behalf of the Polish employees. There would be no objection, however, to the making of arrangements for the employees themselves voluntarily contributing directly to the insurance institution not only their own share of the premiums but also, should they feel that by so doing they would gain a benefit, the share attributed under Polish law to the employer.

The Department would have no objection to American diplomatic and consular officers voluntarily furnishing from time to time, upon request from the competent Polish authorities, information regarding changes in personnel and the amount of salaries paid. However, no obligation should be undertaken in this connection since American diplomatic and consular officers cannot appropriately be made agents of the Polish Government and be required to assume affirmative duties to that Government.

With regard to that phase of the Polish compulsory insurance which is wholly for the account of the employer, that is, insurance against personal injuries, it may be pointed out that under the Federal Compensation Act of the United States, this Government already provides for its civil employees, both American and foreign, without cost to them, benefits payable in cases of disability or death resulting from injuries sustained in the performance of duty.

As to Polish citizens employed personally by consular officers, it was stated :

Insofar as American consular officers in Poland are concerned, they would be exempt from the obligation of the laws in question only if their share in the payments could be considered as a tax levied upon their persons or property and hence, as coming within the scope of Article XVIII of the Treaty of Friendship, Commerce and Consular Rights between the United States and Poland, signed June 15, 1931. From the information in the Department's possession it is doubtful that the payments could be

regarded as such a tax. Of course, should consular officers of any other country be exempted from the payment of such insurance premiums, American consular officers could claim a similar exemption under Article XV of the aforesaid treaty.

The Assistant Secretary of State (Carr) to the Ambassador in Poland (Cudahy), no. 138, Dec. 12, 1934, MS. Department of State, file 124.60C 3/210.

For the correspondence above referred to concerning Czechoslovakian social-security laws, see despatch 955 from the Embassy in Prague to Secretary Kellogg, Dec. 10, 1925, and the Department of State to Minister Einstein, Feb. 20, 1926, *ibid.* 124.60f1/127; Mr. Einstein to Mr. Kellogg, no. 1000, Mar. 22, 1926, and the Department of State to Mr. Einstein, no. 360, June 14, 1926, *ibid.* 124.60f3/95; the Comptroller General (McCarl) to Mr. Kellogg, Dec. 3, 1926, and Assistant Secretary Olds to Mr. Einstein, no. 413, Dec. 14, 1926, *ibid.* 124.60f3/100; Mr. Einstein to Mr. Kellogg, no. 1191, Jan. 14, 1927, *ibid.* 124.60f3/102. See also Mr. Carr to the Chargé d'Affaires ad interim in Prague (Tuck), no. 228, Jan. 25, 1933, *ibid.* 124.60f3/123.

In 1929 the American Embassy in Germany reported to the Department of State that the German Government desired to have German sick- and unemployment-insurance legislation applied to employees in foreign consulates. The law provided for contributions by the employer as well as by the employee. The Department declined to assume any obligation to pay part of the cost of the insurance but stated that it would endeavor to adjust the compensation of the employees involved by increases to offset the payments, which would enable the employees to make the payments directly. To the German reply that this would involve drastic changes in the law, the Department said that the proposal was advanced merely as a means of arriving at a working agreement which would not be incompatible with the resources at the disposal of the Department under existing legislation. The German Government agreed to the proposal. However, in an instruction of 1932 to the Ambassador, the Department said that because of reduced appropriations it was not in a position to increase the salaries of employees to enable them to pay the employers' taxes. It also said that no obligation could be undertaken to discharge a German employee for failure to pay insurance premiums but that such failure, where the salary seemed to be adequate, might reasonably be considered as a factor in deciding whether the employee's services were satisfactory in the discretion of the officer in charge. A substantially similar view was expressed by the Department in an instruction of Mar. 1932 to the American Consul General at Berlin. Ambassador Schurman to Secretary Stimson, no. 4970, Oct. 8, 1929, and Assistant Secretary Castle to Mr. Schurman, no. 3311, Nov. 9, 1929, MS. Department of State, file 120.6/13; Ambassador Sackett to Mr. Stimson, no. 45, Feb. 26, 1930, and Mr. Carr to Mr. Sackett, no. 46, Apr. 12, 1930, *ibid.* 120.6/16; Mr. Sackett to Mr. Stimson, no. 711, Jan. 8, 1931, and Mr. Carr to Mr. Sackett, no. 304, Mar. 16, 1931, *ibid.* 120.6/24; Mr. Sackett to Mr. Stimson, June 6, 1932, and Assistant Secretary Rogers to Mr. Sackett, no. 675, Aug. 9, 1932, *ibid.* 120.6/34; Mr. Carr to the Consul General at Berlin (Messersmith), Mar. 14, 1932, *ibid.* 120.6/27.

In an instruction of May 1932 to the Consul General at Glasgow with reference to similar legislation, the Department said that if the terms of employment were such as to fall within the statutory definition there was no reason why employees, if they desired, could not secure the benefits of insurance if sufficiently interested to pay the ordinary fees. A similar instruction was sent to the Consul General at London. Mr. Carr to the

Consul General at Glasgow (Honaker), May 4, 1932, *ibid.* 120.6/31; Mr. Carr to the Consul General at London (Halstead), May 4, 1932, *ibid.* 120.6/32.

It is believed that a consular office of this Government should not act in the collection of a tax on behalf of a foreign government and the Consulate should therefore pay its employees the full contractual salary, leaving to the employee the adjustment of any tax relation with his own government.

Accordingly, you will take no action to collect the tax and you will not exercise any pressure upon the employees of the office with regard to the payment of such taxes.

The Assistant Secretary of State (Carr) to the Consul in New Zealand (Boyle), Jan. 27, 1933, MS. Department of State, file 125.1533/120; 6 Comp. Gen. 746.

Some of the above correspondence concerning social-security taxation relates to diplomatic as well as consular officers. For further correspondence along similar lines involving only diplomatic officers, see: the British Foreign Office to Ambassador Reid, Aug. 10, 1912 (enclosure in despatch 2071 from the American Embassy in London, Aug. 22, 1912), MS. Department of State, file 841.506/7; Mr. Reid to the Secretary of State for Foreign Affairs (Grey), Sept. 27, 1912 (enclosure in despatch 2109 from the American Embassy in London, Oct. 4, 1912), *ibid.* 841.506/9; Assistant Secretary Adey to Minister Phillips, no. 93, Oct. 13, 1920, *ibid.* 701.0611/93; the Acting Secretary of State (Carr) to the American Embassy in Paris, telegram 183, Aug. 1, 1930, *ibid.* 124.513/673; Ambassador Edge to Secretary Stimson, telegram 248, Aug. 6, 1930, *ibid.* 124.513/675; Assistant Secretary Carr to Ambassador Straus, no. 751, Feb. 12, 1935, *ibid.* 124.513/923; the French Minister of Foreign Affairs to the Chiefs of Diplomatic Missions, Apr. 16, 1936 (enclosure in despatch 2753 from the American Embassy in Paris, May 9, 1936), *ibid.* 124.513/963; Mr. Carr to Mr. Straus, no. 1358, June 10, 1936, *ibid.* 124.513/965; Mr. Straus to Secretary Hull, no. 2879, July 1, 1936, *ibid.* 124.513/971.

By an act approved on August 10, 1939 the United States Social Security Act was amended so as to except from the term "employment", within the meaning of the act, "Service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative)".

53 Stat. 1375. Prior to the enactment of the amendment the Treasury Department held that "foreign consulates and employees of foreign consulates in the United States are entitled to exemption [from taxation under the Social Security Act] only as provided by treaty with the countries which they represent." The Acting Secretary of the Treasury (Magill) to the Secretary of State (Hull), Sept. 6, 1938, MS. Department of State, file 811.5074 Foreign Dip. and Con. Officers/81.

In 1938 the Latvian Minister in the United States requested the refund of the amount of the war tax paid by the wife of the Latvian

Consuls
assigned
to third
countries

Vice Consul in Cuba on a steamship ticket purchased in New York. The Department transmitted to the Minister the decision of the Treasury Department, to which the matter had been referred, rejecting the claim. The treaty of friendship, commerce, and consular rights of 1928 between the United States and Latvia (4 Treaties, etc. [Trenwith, 1938] 4400), upon which the Minister relied, exempts consuls from taxation upon their persons or property (art. XIX). The Treasury Department pointed out that the first sentence of article XVII "discloses that the treaty relates to consular officers received by one of the High Contracting Parties—'from the other'".

The Latvian Legation to the Department of State, June 22, 1938, and the Department of State to the Latvian Legation, Nov. 10, 1938, MS. Department of State, file 702.60P37/1; for earlier correspondence permitting the exemption to Swedish and Danish Consuls, see the Secretary of the Treasury (Mellon) to the Secretary of State (Kellogg) (undated, received Oct. 28, 1926), *ibid.* 702.0611/227.

Retired
officers

In reply to an inquiry from an American consular officer in Cuba as to whether retired American consular officers living in Cuba were entitled to exemptions from taxes and customs duties accorded consuls under the consular convention of 1926 between the United States and Cuba, the Department of State said:

It is not the understanding of this Department that retired consular officers are entitled to the exemptions to which you refer. The Convention was intended to apply only to consular officers of either country on duty in the other.

Assistant Secretary Carr to Consul General Cameron, Aug. 12, 1935, MS. Department of State, file 702.0637/32. 4 Treaties, etc. (Trenwith, 1938) 4048.

In a circular instruction of August 19, 1937 to diplomatic officers, the Department of State said:

Customs

Articles 425 and 426 of the United States Customs Regulations of 1931 [Customs Regulations of the United States (1937), arts. 432-433] provide for the granting of customs courtesies and the exemption from the payment of customs duties, to diplomatic and consular officers of foreign countries and outline the procedure to be followed by such officers in requesting these courtesies.

Foreign consular officers who are nationals of the State appointing them and not engaged in any other business and their families are accorded the privilege of the free entry of their personal and household effects, including intoxicating liquors, at the time of their arrival in the United States to take up their official duties or upon their return to their posts in the United States after leave of absence. The entry of liquors into the States of the United States is governed by state laws pro-

hibiting or regulating the importation or transportation of liquors for beverage use. (Section 2, 21st Amendment to the Constitution of the United States, adopted December 5, 1933).

In the absence of applicable treaty provisions, exemption from the internal revenue tax on intoxicating liquors is not accorded consular officers.

Supplies intended for official use of foreign embassies and legations and foreign consulates in the United States, such as office furniture and office material, may be entered free of duty. Exhibits of the products of foreign countries, *if forming a part of the permanent exhibitions* in the consulates may also be admitted free of duty.

The granting of these customs exemptions to diplomatic and consular officers of foreign countries is conditional upon the granting of similar exemptions to American diplomatic and consular officers by these countries.

The Assistant Secretary of State (Messersmith) to diplomatic officers, Aug. 19, 1937, MS. Department of State, file 701.0611/553B.

The privilege of free entry is not extended to honorary consuls and honorary employees of diplomatic missions and consulates, either accredited to the United States or en route to and from their posts in other countries. However, upon the request of the mission concerned in each instance, arrangements may be made for an expeditious passage of such persons through the customs upon their arrival at United States ports.

Honorary
consuls

The Assistant Secretary of State (Rogers) to the Mexican Ambassador (Puig); July 19, 1932, MS. Department of State, file 701.1211/549.

The Italian Consul in St. Louis, in 1934, desired to purchase an automobile of Italian manufacture which had been imported into the United States under bond for display purposes. The Italian Embassy presented a request to the Department of State that the import duty on the automobile be waived for the reason that the Consul was entitled to free entry of personal effects upon his arrival in the United States, that he had been in the United States less than six months, and that in similar circumstances Italian authorities would allow free importation to American Consuls for a period of six months after arrival in the country. The Department transmitted to the Embassy a letter from the Treasury Department concluding as follows:

The automobile in this case was clearly not imported as baggage or effects of the Consul; the importation was not incident to the arrival of the Consul, and the Consul was apparently not concerned with the importation. Under the circumstances, this Department does not consider itself warranted in authorizing the cancellation of the bond covering the importation unless

the automobile is exported, or liquidated damages equal to the duty due are paid.

The Italian Embassy in Washington to the Department of State, Aug. 15, 1934, and the Department of State to the Italian Embassy, Aug. 17, 1934, MS. Department of State, file 611.65241/136½; the Italian Embassy to the Department of State, Aug. 20, 1934, *ibid.* 611.65241/137½; the Department of State to the Italian Embassy, Sept. 28, 1934, *ibid.* 611.65241/138½.

Articles for
personal use

Under special treaty provisions or reciprocal agreements, consular officers (consuls general to vice consuls, inclusive) and their families, and in some instances the non-commissioned personnel of consulates, who are nationals of the State appointing them and not engaged in any private occupation for gain are accorded the privilege of importing articles for their personal use free of duty subsequent to their first arrival in the United States to take up their official duties or after return from leave of absence spent abroad.

The Assistant Secretary of State (Rogers) to the Mexican Ambassador (Puig), July 19, 1932, MS. Department of State, file 701.1211/549.

With reference to the right of foreign consuls in the United States to bring untaxed and undeclared alcoholic liquors into the United States from Mexico, the Department of State, after pointing out that §§ 252 to 254 of title 22 of the United States Code applied to ambassadors and ministers but not to consuls, said:

"However, the attention of the United States Attorney may be invited to the fact that this Government has treaties with certain countries under the provisions of which, on a basis of reciprocity, consular officers in the country of the other may import certain goods for their personal use free of duty and internal revenue tax. This Government also has reciprocal agreements with certain other countries under the provisions of which consular officers, who are its nationals and are not engaged in any other occupation for gain, may likewise import certain goods for their personal use without the payment of duty. The importation of liquor is permissible under these treaties and agreements. However, before shipments may be released, application must be made through diplomatic channels to the Department of State, and appropriate instructions must be issued to the collector of customs by the Treasury Department in each instance. Honorary consuls and honorary vice consuls are never accorded the privilege of free importation." The Assistant Secretary of State (Messersmith) to the Attorney General (Murphy), June 30, 1939, MS. Department of State, file 811.114 Diplomatic/441.

Article 17 of the treaty of friendship, commerce, and consular rights of 1931 between the United States and Poland grants to the consular officers of each country "the privilege of entry free of duty of their baggage and all other property intended for their personal use, accompanying the officer to his post; provided, nevertheless, that no article, importation of which is prohibited by the law of either of the High Contracting Parties, may be brought into its territories". In 1935 the Polish Government refused to permit the free importation of foodstuffs and beverages under this provision, on the ground that the importation of such articles without the payment of duty was prohibited by Polish law. The Department of State instructed the Ambassador in Poland to say to the Foreign Office:

"Refusal to admit free of duty foodstuffs and beverages belonging to consular officers of the United States on the ground that their admission free of duty is prohibited would logically require similar refusal with respect to all other property not admissible free of duty. Such a refusal would entirely nullify the purpose and intent of this provision of the treaty and make it worthless." Ambassador Cudahy to Secretary Hull, telegram 109, Dec. 12, 1935, MS. Department of State, file 123B46/238; Acting Secretary Carr to Mr. Cudahy, no. 77, Dec. 23, 1935, *ibid.* 123B46/241; Acting Secretary Phillips to Mr. Cudahy, telegram 10, Mar. 17, 1936, *ibid.* 123B46/263; Mr. Cudahy to Mr. Hull, telegram 22, Mar. 19, 1936, *ibid.* 123B46/264.

Concerning the importation of liquors into the United States by foreign consular officers (during the period in which the eighteenth amendment to the Constitution of the United States was in force) the Department of State took the position that the privilege enjoyed by the members of the Diplomatic Corps in Washington with respect to the importation of alcoholic beverages could not be extended to consular officers. Prohibited goods

The Department of State to the Siamese Legation, Feb. 18, 1920, MS. Department of State, file 702.09/2. To the same effect, see the Second Assistant Secretary of State (Adee) to the Minister of Denmark (Brun), Dec. 5, 1919, *ibid.* 702.09; the Acting Secretary of State (Polk) to Representative Mondell, Mar. 2, 1920, *ibid.* 702.09/3; Mr. Polk to Otis B. Kent, Mar. 27, 1920, *ibid.* 702.09/4.

In August 1935 the Department of Alcoholic Beverage Control of the State of New Jersey called the attention of the Department of State to article XXVII of the treaty of friendship, commerce, and consular rights of 1923 between the United States and Germany (4 Treaties, etc. [Trenwith, 1938] 4202), providing that German consular officers may import personal property free of duty "provided, nevertheless, that no article, the importation of which is prohibited by law of either of the High Contracting Parties, may be brought into its territories", and inquired whether, under this provision, German consular officers residing in New Jersey might import alcoholic beverages from abroad without first obtaining a special permit pursuant to a law of New Jersey covering the transportation of alcoholic beverages into that State. The Department of State expressed the view that "these German consular officers may properly be required to obtain a special permit from the New Jersey State Department of Alcoholic Beverage Control before such shipments of alcoholic beverages are brought into the State of New Jersey" and that such action "would not contravene the provisions of Article XXVII of the Treaty with Germany above-mentioned".

The Commissioner of the Department of Alcoholic Beverage Control of New Jersey (Burnett) to the Secretary of State (Hull), Aug. 22, 1935, and

the Legal Adviser of the Department of State (Hackworth) to Mr. Burnett, Sept. 14, 1935, MS. Department of State, file 702.6211/744.

**Local
duties**

In a *note verbale* of June 28, 1909 to the Royal Ministry of Foreign Affairs, the American Ambassador at Catania requested that there be refunded to the American Consul at Catania a sum paid by the consul in *octroi* duties on official supplies and furniture for the Consulate. The Ministry replied that, while provision was made for the introduction free of duty of official supplies for the American Consulate through the Royal Custom House at Catania, the regulations in force on the matter of *octroi* (town duty) did not admit of any exemption in favor of foreign consular officials, such exemption being allowed only for supplies addressed to diplomatic officials. The Department informed the Embassy that no further action need be taken in the matter.

The Chargé d'Affaires ad interim in Italy (Garrett) to the Secretary of State (Knox), no. 58, Oct. 7, 1909, and the Assistant Secretary of State (Wilson) to Mr. Garrett, no. 30, Nov. 4, 1909, MS. Department of State, file 9014/187-190.

POWERS AND DUTIES

SCOPE AND LIMITATION

§439

The Foreign Service Regulations of the United States, section VIII-5, January 1941, provide:

**Jurisdiction
of consulates**

... *Jurisdiction of consulates.* In the absence of instructions specifically defining the consular district, such district shall include all places nearer to the seat of the consulate than to the seat of any other consulate within the same allegiance.

A consular officer shall not, except under special authorization from the Department of State, take jurisdiction of consular business outside of the limits of his consular district.

[Ex. Or. April 4, 1939.]

The general powers, duties, and liabilities of consular officers are prescribed in §§ 72 to 109, inclusive, of title 22 of the United States Code, but the powers, etc., there specified are "not to be construed as implying the exclusion of others resulting from the nature of their appointments, or prescribed by any treaty or convention under which they may act". 22 U.S.C. §71.

**Official and
unofficial
acts**

The distinction between the official and private character of consular duties and activities was set forth by the Department of State in 1907 as follows:

A consular officer is sent abroad not to occupy himself with attempts to settle private quarrels, but to devote his time and

energies to the representation of the United States and its interests. His official dignity and his usefulness require a degree of circumspection which would not be necessary in a private individual. It is not always possible to separate the official and the private character of the officer. His official character imposes upon his private activities many restraints and obligations. Exceptional cases may arise where it is unobjectionable for an official of the government to use his influence for the good in a private matter, but unless he has the talent to do so without becoming involved or embroiled in difficulties and above all, without committing himself in writing as a partisan or indulging in extravagant or indiscreet language, he should certainly hold himself aloof. Aloofness and reserve should, in fact, characterize his attitude toward private contentions. An officer's paramount duty is to his government and no considerations of friendship or private opinion can justify a departure from these rules.

The Third Assistant Secretary of State (Wilson) to the Consul at Geneva (Keene), no. 29, Feb. 4, 1907, MS. Department of State, file 1001/9.

In 1892 a French national, Georges Poulet-Duclere, died in Rio de Janeiro leaving among his papers a will naming George A. Church, of New York, his sole legatee. The will, with the other papers, was, at the request of Church, turned over to the American Consul General at Rio de Janeiro, and the receipt thereof was acknowledged by the Vice Consul General. Church later wrote to the Consul General at Rio de Janeiro requesting that the papers of the decedent be turned over to the French Consul there, to be forwarded to France. Notwithstanding diligent inquiries, the papers in question could not be located either at the Consulate General at Rio de Janeiro or in the possession of any of the various officers who had been connected with that Consulate. The Department accordingly informed Church's attorney of the fruitless investigations and advised him that, as the entire transaction was of a private and not of an official nature, no further steps could properly be taken by the Department. The Department suggested that the aggrieved party was at liberty to bring an action on the bond of the Consul General in case he was not satisfied with the ruling of the Department.

In a letter of September 12, 1906 the attorney questioned the conclusion reached by the Department "that the services rendered by . . . the Consul General cannot be regarded as official but were in his private capacity", and he contended that the officers of the Consulate having to do with the matter in question had acted in their official capacity and, consequently, official responsibility attached for any negligence which might be proved on their part. In reply, the Department expressed the following views:

As to the responsibility of an American consular officer who consents to act as a depository for papers or other valuables,

you are referred to the Department's letter of December 23, 1885, to Minister Cox in regard to certain papers which were alleged to have been intrusted to Mr. Boker, United States Minister to Turkey, and by him deposited in the Imperial Ottoman Bank on behalf of an American citizen, in which the Department says:

"It is common for parties to seek to deposit papers and valuables with our legations for safe-keeping. It is no part of the business of a legation to act as a safe-deposit institution, and no responsibility can attach to the Minister if he yield to the request and take such property into his keeping, without valuable consideration. Hence, if Mr. Boker had accepted the papers on deposit in the legation, and so receipted for them, no responsibility would rest on Mr. Boker, and, consequently none whatever on the legation

"Whatever he did was personal to himself, and could not bind his successors, or the Government which appointed them. If any attempt should be made to impute such responsibility to the legation or yourself, you will deny it."

If it was Mr. Church's intention to appoint the American consul general as his representative to look after his interests in connection with the estate in question, the Department has repeatedly ruled that such services on the part of the American consular officer are entirely unofficial and constitute a private business transaction between the consular officer and his client. (See Department's letter to Miss Heald of July 9, 1886, Domestic Letters, Vol. 160, p. 665; Wharton's International Law Digest, paragraph 99.)

You say that you "should esteem it a great favor if the Department would inform you, for your own satisfaction, of the test applicable in determining whether a given action should be considered official or not". In reply the Department must say that it does not know of any rule of thumb by the application of which transactions may be at once classified as official or unofficial. It is an ordinary question of the law of agency, and the scope of the consul's agency is defined by the statutes of the United States, the law of nations, and the regulations of the Department. Whenever any transaction, tested by these standards, falls within the scope of the consular agency, it is properly deemed official, and not otherwise.

The Third Assistant Secretary of State (Wilson) to Harry Learned, Oct. 12, 1906, MS. Department of State, file 1196.

I have noted your statement that a consul cannot be properly involved in a court action as a result of acts performed in the exercise of his functions. A careful examination of the treaty provisions which would be applicable to the case under discussion leads me to the conclusion that should it appear that the Bolivian Consul General in New York had committed an act constituting a crime, he could be prosecuted for that act. Article 14 of the Convention in regard to consular agents, signed at Habana February 20, 1928, to which you refer, states that:

"In the absence of a special agreement between two nations, the consular agents who are nationals of the state appointing them, shall neither be arrested nor prosecuted except in the cases when they are accused of committing an act classed as a crime by local legislation."

Article 16 of the same Convention provides in part that:

"Consuls are not subject to local jurisdiction for acts done in their official character and within the scope of their authority." It can hardly be seriously contended that crimes committed by consular officers could be considered as acts performed "in their official character and within the scope of their authority".

The Under Secretary of State (Welles) to the Bolivian Minister (Finot), Feb. 27, 1936, MS. Department of State, file 810.79611 Tampa - New Orleans - Tampico Airlines/283.

It is provided in title 22 of the United States Code, §103 (Rev. Stat. §§ 1735 and 1736), that consular officers shall be liable on their bonds for damages caused by wilful neglect or omission to perform the duties imposed by law or by wilful malfeasance or abuse of power or corrupt conduct in office. In an action brought under this section alleging libel in a consul's official confidential report on persons engaged in business in his district, the Court of Appeals of the District of Columbia held that such communications were privileged. The court stated:

Liability
of officer

... In our opinion these provisions [of law] relate to transactions wherein the consul is dealing directly with the party injured, and violates a duty imposed upon him by law in respect to such person. This view is illustrated by the cases of *American Security [? Surety] Co. v. Sullivan* (C.C.A.) 7 F. (2d) 605; *Cunningham v. Rodgers*, 50 App. D.C. 51, 267 F. 609, affirmed 257 U.S. 466, 42 S. Ct. 149, 66 L. Ed. 319; *Dainese v. Hale*, 91 U.S. 13, 23 L. Ed. 190; and *Claim of Peterson*, 19 Op. of Attys. Gen. 22.

In *American Surety Co. of New York et al. v. Sullivan* the United States Circuit Court of Appeals for the Second Circuit affirmed a decision of the District Court of the United States for the Southern District of New York awarding damages in an action against a surety on the bond of an American Consul. The damages were sustained by reason of the refusal of the Consul to visa the plaintiff's passport and his consequent inability to return to the United States. The plaintiff was an American shipmaster who, in 1917, had taken an American vessel to a foreign port, had there severed his connection with it, and had applied for a visa for his return to the United States. The Consul had been informed that the vessel was to be sold to an alien. In accordance with an act and a proclamation pursuant thereto requiring the approval of the United States

Shipping Board for the sale of American vessels to aliens or their transfer to foreign registry, the Consul referred the proposed sale to the Shipping Board. Acting, as he believed, pursuant to instructions to decline to render services in connection with the transfer of American vessels to aliens and to instructions to decline to issue visas to persons desiring to come to the United States if he was convinced that the journey was for an inimical purpose, and considering the possibility that the sale of the vessel would not be approved, the desirability of keeping American vessels in operation during the war emergency, and the fact that the plaintiff was the only American master available, the Consul refused to issue the visa.

The court said that—

all they [the Consul's instructions] meant was that he should give no direct assistance to the transfer. His interpretation overzealously extended this to mean that he should actively discourage the transfer at the expense of Sullivan, who had nothing further to do with it. That was not an error in the discharge of his duties, but an error in understanding what they were, and for that he is liable.

The second excuse is even more plainly untenable. Sullivan's journey home was not "inimical" to the United States, except in the sense that he would not be able to sail the schooner after he had left. The instructions clearly did not go so far, but only applied to persons whose presence in the United States might be dangerous in time of war. . . .

. . . a public officer, while not chargeable for the mistaken exercise of his actual powers, is responsible for keeping within them. He may not use his authority to excuse action which it does not justify. . . . The word "willful," even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.

United States, to Use of Parravicino v. Brunswick et al., 69 F. (2d) 383, 386 (D.C. App., 1931); the Consul at Basseterre, Guadeloupe (Wilcox) to the Secretary of State (Lansing), nos. 21 and 34, June 8 and Nov. 7, 1917, MS. Department of State, file 195.2/961, /1299; *American Surety Co. of New York et al. v. Sullivan*, 7 F. (2d) 605, 606 (C.C.A. 2d, 1925).

The Norwegian Chargé d'Affaires ad interim to the United States inquired as to the attitude of the Department of State toward "questions of indemnifying private concerns for acts arising out of erroneous dispositions by Foreign Service Officers, who either could not or would not pay the indemnity imposed upon them by court". The Chargé d'Affaires gave the example of a consul who erroneously awarded wages to a crew beyond the date of a shipwreck. The Department enclosed with its reply a form of bond which American Foreign Service officers are required to furnish and referred to title 22

of the United States Code, §103 (11 Stat. 64; 5 Stat. 397). It added that—

when a consular officer of the United States is guilty of malfeasance in office or abuse of power, the injured party has an action against the consul or against the sureties on the official bond of the consul. While the question whether the action of a consul in requiring payment of compensation beyond the date of shipwreck would fall within the scope of the law quoted would be one to be decided by the courts in the United States should such a question arise, it seems not improbable that action of a consul in requiring excess compensation for members of a crew would constitute malfeasance or abuse of power within the meaning of the law. In the event that a party injured by the action of a consul could not recover from the consul himself or from his sureties, the only recourse the injured party would have would be to seek relief through special legislation by the Congress.

The *Chargé d'Affaires ad interim* (Lundh) to the Secretary of State (Kellogg), Mar. 21, 1927, and the Under Secretary of State (Grew) to Mr. Lundh, Apr. 22, 1927, MIS Department of State, file 1203/117.

In 1924 a German citizen presented a claim against an American Consulate in Germany on account of the alleged embezzlement of a sum of money by a German subject employed in the Consulate. It appeared that this employee, together with the claimant and other German citizens, was engaged in speculation in foreign exchange, and it was alleged that the employee had misled the complainant into believing that he was acting on behalf of the Consulate. It also appeared that some of the drafts involved in the transactions had been endorsed by an American Vice Consul with the official stamp of the Consulate. The Consul was entirely unaware of the transactions. He advised the complainant that the matter referred to was one between her and the former employee and that neither the Consulate nor the Government of the United States would accept any responsibility for the actions of the employee. The Department of State, after considering the pertinent statute (22 U.S.C. §106) and consular regulations (Consular Reg. U.S. secs. 456-457 [revised, 1896]), forbidding consuls to engage in private business, limiting the use of the seal to official business, and forbidding the use of the consul's official title on private obligations such as checks, concluded:

Acts beyond
scope of
authority

It seems perfectly clear, therefore, that the act of [the] vice Consul . . . in endorsing the checks was not within the actual or apparent scope of his authority and that this Government could not be held responsible for his act from which it derives no benefit, which it disavowed as soon as it was brought to its

attention and for the result of which remedy may be had in its courts.

Consul Sauer to Secretary Hughes, no. 566, Mar. 5, 1924; the Chief of the Consular Bureau (Hengstler) to Mr. Sauer, Mar. 29, 1924; Assistant Secretary Carr to Consul Morris, Feb. 13, 1925: MS. Department of State, file 123 Roettgen, Werner.

Deposit
of valuables

In 1911 the superintendent of a Honduran railroad, which was partly American owned, requested permission of an American Consul in that country to deposit money and papers in the Consulate, fearing that the railroad would be seized by the Honduran Government. The Department instructed the Consul that—

there is no authority for you to accept such money and papers with a view to segregate them from any rumored action on the part of the Honduran Government. A consul may claim inviolability for the archives and official property of his office, but he has no immunity whatever against the laws of the land with reference to the property of others in his charge, and their possession might tend to bring him into conflict with the authorities.

The Second Assistant Secretary of State (Adee) to Consul Dawson, no. 64, Aug. 10, 1911, MS. Department of State, file 815.77/52.

During the revolution in Mexico in 1914 the American Vice Consul at Saltillo was imprisoned and some of the contents of the Consulate taken by revolutionary forces. Included in the property lost was a box of jewelry left at the Consulate by an American citizen. The American representative in Mexico City subsequently received a communication from the owner stating that Americans had been urged to leave Mexico and to turn over their effects to the nearest consular agent and that he believed that he should be reimbursed for his loss by the United States Government. The Department expressed the following view:

. . . When American diplomatic or consular officers accept the custody of property belonging to American citizens residing in foreign countries, they do so with the understanding that neither they nor the Department assume any responsibility in the matter. You may so inform Mr. Niclaus and say that, in the opinion of this Department, his letter to you dated August 22, 1916, discloses no grounds for a claim against this Government and that there are no funds at the disposal of the Department from which payment of such a claim could be made.

Charles B. Parker, acting in representation of American interests at Mexico City, to Secretary Lansing (with enclosures), no. 49F, Aug. 25, 1916, and the Second Assistant Secretary of State (Adee) to Mr. Parker, no. 1988, Oct. 6, 1916, MS. Department of State, file 125.827/7. In an office memorandum attached to this correspondence it is said that the advice to American citizens alleged by the claimant was never issued by the Department of State.

The Department deems it inadvisable for its consular officers to accept valuables for safekeeping since by so doing obviously they invite international complications through the acts of irresponsible individuals.

The Director of the Consular Service (Carr) to Consul Yost, no. 106, Apr. 30, 1920, MS. Department of State, file 199.3/8.

In 1934 an American Consul in Mexico, fearing an uprising and a raid on a bank containing funds of American citizens, received for safekeeping a sum of money belonging to the bank. The Department of State instructed the Consul to decline to store the valuables. Secretary Hull to Consul Goforth, telegram of Oct. 16, 1934, MS. Department of State, file 199.3/775A; Mr. Goforth to Mr. Hull, no. 84, Oct. 17, 1934, and Assistant Secretary Carr to Mr. Goforth, Oct. 27, 1934, *ibid.* 199.3/776.

In 1915 the American Consul General at Yokohama received from an American citizen in Japan a draft which he transmitted to the Department of State, requesting that the Department forward it to the wife of a German consular officer formerly in Japan. The Department returned the draft to the Consul General, stating:

The Department understands that Mr. and Mrs. Fuehr are German subjects. It is not a usual practice for American consular officers to accept or remit money in connection with the private transactions of American citizens abroad, and it is not believed that consular officers should go farther in assisting the nationals of countries with whose interests they are temporarily entrusted than they do in assisting American citizens.

Transmission
of funds

It would seem that if it was possible to do so, Mrs. Gill should have consummated the transaction directly with Mrs. Fuehr without involving the American Consulate General in the matter. The only reason which occurs to the Department why Mrs. Gill could not have forwarded the money to Mrs. Fuehr is that the laws of Japan forbid the remitting of money from Japan to enemy subjects. If the Japanese law contains such prohibition it would seem that neither the Department nor the Consul General may properly act as a channel for transmitting money from Japan to German subjects.

If it is found that there is no Japanese law prohibiting the transmission of the money to a German subject, or that there be no objection on the part of the Japanese Government, the draft may be returned for transmission to Mrs. Fuehr. However, it is suggested that Mrs. Gill should endeavor to consummate the transaction directly and not through the Consulate General.

The Director of the Consular Service (Carr) to Consul General Scidmore, no. 114, Dec. 23, 1915, MS. Department of State, file 702.6294/19.

. . . in connection with the transmission of funds to persons residing abroad and as an accommodation to coordinate departments of the Government, to State industrial boards, to State compensation or similar commissions, or to courts or their officers, such, for example, as administrators or executors, the Department

has permitted its consular representatives abroad to receive and forward funds to foreign beneficiaries, and to take their receipts therefor. This has been done, however, with the distinct understanding that those officers can assume no responsibility in connection therewith other than the exercise of their best judgment and discretion in causing the funds, in such form as the sender may elect, to be delivered to the person or persons designated by the sender.

The Chief of the Division of Foreign Service Administration (Hengstler) to Frederick B. Wiener, May 11, 1933, MS. Department of State, file 311.623/501.

In a case in which the proceeds of an estate were transmitted by the executor in the United States to an American Consul in Sweden for delivery to beneficiaries and were delivered, by mistake, to the wrong person, the Department of State said that—

the transmission of funds to beneficiaries abroad by American Consular officers is not within the province of their official duties and . . . such services when rendered by American Consular officers are unofficial and merely gratuitous.

The Department regrets that payment of the inheritance was made to the wrong persons but, from the reports of the American Consul General at Stockholm and of the Swedish postal authorities, it does not consider that this Government is responsible for any loss that might result from the erroneous payment, in view of the earnest efforts made by the American Consul in charge and by the Swedish postal and church authorities to find the beneficiaries; of the similarity in the names of the beneficiaries and of the parties who wrongfully received the money; of the fact that the Swedish postal authorities appear to have furnished Gustaf Karlsson and his wife, Anna, with the information that made it possible for them to obtain the money; and of the further fact that the receipt for the money was acknowledged by a Swedish notary.

Since the parties who admit that they wrongfully received the money and the parties who assert that they are rightfully entitled to the money, and the notary who acknowledged the receipt for the money, are all Swedish nationals resident in Sweden, the matter would appear to be one to be adjusted by the interested parties in Sweden in accordance with Swedish laws.

The Second Assistant Secretary of State (Adee) to the Swedish Minister (Wallenberg), Dec. 2, 1921, MS. Department of State, file 311.583/201.

Engaging in
business

Officers of the Foreign Service are forbidden to transact, engage in, or have any interest in any business to, from, or within the limits of their respective jurisdictions, either in their own names or in the names or through the agency of any other persons.

Officers of the Foreign Service are also forbidden to make any investments of money within the limits of the foreign country

to which the officers are accredited or assigned. This prohibition shall apply to the owning of real estate, bonds, shares, stocks, and mortgages, but does not extend to the purchase of a house and land for personal use. (Feb. 5, 1915, and Apr. 5, 1906; 38 Stat. 807, 34 Stat. 101; 22 U.S.C. §§ 38, 106.)

For. Ser. Reg. U.S. I-10, Jan. 1941; Ex. Or. 8396, Apr. 18, 1940.

In 1928 the ratepayers of the former British concession at Hankow, China, requested that the American Consul in that city, as Senior Consul, act as one of the trustees of a debenture redemption fund to be created to meet the existing debentures of the ex-concession. The Department of State instructed the American Minister that it considered it inadvisable to accede to the request and in an informal letter to him stated that—

the Department understands that the Senior Consul, when functioning as such, acts in a representative capacity and is guided by the desires of his colleagues. The Consular Body can act through the Senior Consul only in relation to those matters wherein they have common interests and rights. . . . In other words, the American Consul General, when Senior Consul and functioning as one of the trustees of the proposed debenture redemption fund, would have no particular standing or authority other than that derived from an agreement to which his own Government was not a party. The Department could not, of course, authorize him to assume, either personally or officially, any of the ordinary liabilities arising from a trusteeship. Moreover, if he were amenable to any authority in the performance of his duties it would be to the Municipal Bureau, a British and Chinese political organization.

Of course the Department has not overlooked the fact that in a number of cases American consular representatives have in the past cooperated with their colleagues in assuming more or less responsibility in the expenditure of public funds, as in conservancy projects at Newchwang, Foochow and Tientsin, but in these instances the United States has been a party to the international understandings on which the arrangements were based.

Minister MacMurray to Secretary Kellogg, telegram 334, May 11, 1928; Mr. Kellogg to Mr. MacMurray, telegram 159, May 15, 1928; the Chief of the Division of Far Eastern Affairs (Hornbeck) to Mr. MacMurray, May 31, 1928: MS. Department of State, file 893.102 Han/66.

CORRESPONDENCE

§440

In an action brought on a consul's bond under title 22 of the United States Code, §103, alleging libel in a consul's official confidential report on persons engaged in business in his district, the Court of Appeals of

Privileged
character

the District of Columbia held that "Under such circumstances the consul enjoys an absolute privilege" and affirmed a decision of the lower court sustaining a demurrer to the complaint.

United States, to Use of Parravicino v. Brunswick et al., 69 F. (2d) 383, 385 (D. C. App., 1934). See also *ante*, pp. 809-810.

In reply to a despatch concerning a suit brought against an American consular officer in Germany for defamation, the Department of State, in 1913, instructed the Embassy in Berlin:

You will inform Consul General Dresden that he is not entitled to exemption from legal process and neither the Department nor the Embassy can properly support his claim to exemption.

Department, however, sees objections to the use in private litigation of a confidential communication made by a consular officer to his government which has come into the possession of a private individual without the consent of the Department or of the officer himself. Therefore you will, as you suggest, present the matter to the Foreign Office in the hope of reaching an understanding whereby the proposed legal proceedings may be quashed after the acceptance of service by the Consul General and also urge upon it the view that the suit should not be prosecuted because it is a private litigation based upon the unauthorized publication of confidential and privileged official communications from the consul to his government, and that as he was not responsible for such publication he should not be brought into the case either personally or officially.

Secretary Bryan to Ambassador Leishman, telegram of Mar. 8, 1913, MS. Department of State, file 123G12/121.

Inviolability

In November 1914 the American Consul in Smyrna informed the Department of State that official United States mail under seal had been refused by Turkish postal officials, who required that mail be opened to inspection and also that the English language not be used. The United States protested, and arrangements were subsequently made with Turkish officials for the transmission through the mails in sealed envelopes of correspondence between the Embassy and the Consulates in Turkey.

Consul Horton to Secretary Bryan, telegram of Nov. 11, 1914, and Mr. Bryan to Ambassador Morgenthau, telegram 21, Nov. 12, 1914, MS. Department of State, file 867.711/1; Mr. Morgenthau to Mr. Bryan, telegrams 22 and 55, Nov. 12 and 26, 1914, *ibid.* 867.711/2. /3.

The Department of State, having been informed in 1915 by the American Consul at Frontera, Mexico, that he was not permitted to send code messages unless translated, instructed the Consul at Veracruz to inform the proper authorities that the Government of the United States insisted upon the right of its consuls to communicate

freely with the Department and to use code whenever they considered it advisable to do so.

Secretary Bryan to the Consul at Veracruz (Canada), Feb. 8, 1915, MS. Department of State, file 702.03/25.

Following a *coup d'état* in Foochow, China, the American Consul joined with other members of the consular body in a protest by the Senior Consul to the local military commissioner regarding the action of a censor in preventing the transmission of telegraphic communications to their respective legations at Peiping. The note of protest contained the following statement:

Under international law a consular officer has the right of free communication with his own government and with the diplomatic and consular representatives of his government stationed in the same territory; the consular officer may use the post or telegraph and he may send his messages in cipher.

The Department of State approved the statement and the action of the Consul in joining in the protest.

Consul Sokobin to Secretary Stimson, no. 321, Jan. 10, 1930, and Assistant Secretary White to Minister Johnson, no. 91, Apr. 23, 1930, MS. Department of State, file 701.03/65.

A Treasury Department ruling (no. 5) of June 6, 1940 prohibited the bringing into the United States of securities or evidences thereof except upon compliance with specified conditions, and subjected articles arriving from foreign countries suspected of containing such securities to customs inspection in accordance with the Customs Regulations of 1937. As to the applicability of this order to foreign consular officers in the United States the Department of State, in a letter of July 16, 1940 to the Secretary of the Treasury, said:

The Department of State is not aware of any treaty or statutory prohibitions which would prevent this Government from subjecting the persons of, the baggage of, or mail addressed to foreign consular officers to the same treatment now accorded any other mail, baggage, or person entering the United States under the same circumstances. However, it is felt that for reasons of policy (1) sealed letters addressed to a consular officer by his government or by a diplomatic officer or another consular officer of his government and bearing the official seal of his government, (2) official consular pouches, and (3) packages addressed to a consular officer bearing the official seal of his government and accompanied by certificates under such seal to the effect that they contain only official communications or documents, should, for the present, be excepted from examinations made under General Ruling No. 5. Other mail and packages addressed to a foreign consular officer need not be excepted from examinations made under this ruling. With respect to the examination of the person and the baggage of a foreign

consular officer upon his arrival in the United States, there would appear to be no objection to the following by the Treasury Department of the customary procedure with respect to such an officer relating to the ascertaining of dutiable or prohibited merchandise.

Foreign diplomats in the United States were notified of the Treasury order and the cooperation of their respective governments was requested to insure that official diplomatic and consular pouches, mail, and packages be not used in a manner inconsistent with the ruling, and that diplomatic and consular officers, their families, staffs, and suites strictly observe the provisions of the ruling as to person and baggage.

The German Embassy, on July 12, 1940, notified the Department of instances of delay or the opening of German consular mail arriving from abroad by customs officials in the presence of a representative of the Consulate. The Embassy said:

. . . It is a generally recognized principle resulting from the mutual acceptance of consular officials (that is, official representatives of a foreign government in one's own national territory), that the consulates cannot be subjected, in their official communication with the authorities of their own state, as well as with private persons inside and outside the country, to any surveillance in the form of a search of their mail. That is a natural prerequisite for the performance of the duties entrusted to them, which they perform with the consent of the country to which they are admitted.

The Department replied:

I am informed that instructions have been issued providing that under General Ruling No. 5 of the Treasury Department, dated June 6, 1940, there shall be no examination of the following: (1) Sealed letters addressed to a consular officer by his Government or by a diplomatic officer or another consular officer of his Government and bearing the official seal of his Government; (2) official consular pouches; and (3) packages addressed to a consular officer bearing the official seal of his Government and accompanied by certificates under seal to the effect that they contain only official communications or documents.

Treasury Dept. General Ruling No. 5 Under Section 5 (b) of the Act of October 6, 1917 . . . approved June 6, 1940; Secretary Hull to Secretary Morgenthau, July 16, 1940, MS. Department of State, file 840 51 Frozen Credits/306A; Mr. Hull to foreign diplomatic missions in the United States, July 18, 1940, *ibid.* /302A; Chargé Thomsen to Mr. Hull, July 12, 1940, and the Acting Secretary of State (Welles) to Mr. Thomsen, *ibid.* 702.6211/1210.

Wartime
restrictions

Following the entrance of the United States into the World War of 1914-18, the Mexican Government complained that its consular officers in the United States were not permitted to communicate with the Mexican Government in secret code. The Department of State in-

formed it that, in accordance with the usual practice of belligerent governments, the use of code would be forbidden to consular officers of neutral countries but that this prohibition did not apply to diplomatic officers. It added that in view of the friendly relations between the United States and Mexico an exception would be made in this case.

Ambassador Fletcher to Secretary Lansing, telegram 151, May 4, 1917, and Mr. Lansing to Mr. Fletcher, telegram 163, May 7, 1917, MS. Department of State, file 811.721/3.

The Department of State, on January 5, 1918, while the United States was at war, notified the heads of diplomatic missions at Washington of regulations governing the censorship of mails entering and leaving the United States, including the following:

Although consular officials have no claim as such to uncensored use of the mails, this use will be granted out of courtesy and uncensored correspondence will be permitted between them and their governments, when under official seal. The extension of the privilege of exemption to consular officials shall be strictly confined to Consuls de Carrière.

Supplementing this regulation, the Department, on June 11 following, notified the Japanese Ambassador that "correspondence between diplomatic missions at Washington and their respective consuls as well as correspondence between the consuls themselves, is not subject to censorship under the existing regulations".

The Department of State to diplomatic missions at Washington, Jan. 5, 1918, MS. Department of State, file 811.711/165a; the Department of State to the Japanese Ambassador, June 11, 1918, *ibid.* 811.711/181.

In Jan. 1918 the American Ambassador in France transmitted to the Department of State regulations of the French Government concerning the use of diplomatic pouches, which included the following statement:

"The principles of law do not give to the consuls the privileges which seem necessary for the free exercise of diplomatic functions. Therefore, it seems impossible to us to dispense from control letters coming from them or which are addressed to them, except for letters exchanged with your (Embassy, Legation). However, I wish to give you the assurance that the military postal control will be given instructions to have a special solicitude for their correspondence, although it will be submitted to general rules suitable to all letters having no diplomatic character and to send it to its destination without being hindered through the most rapid routes after having been verified regarding their consular nature."

The Department of State instructed the Ambassador to inform the French Foreign Office that it concurred entirely in the regulations and fully understood the reasons which prompted their issuance. Ambassador Sharp to Secretary Lansing (with enclosure), no. 5956, Jan. 16, 1918, and Mr. Lansing to Mr. Sharp, no. 1990, Feb. 13, 1918, MS. Department of State, file 701.03/33.

In November 1939 the Department of State communicated to the Ambassador in Paris certain information concerning the censorship of correspondence addressed to American Consuls in France and of correspondence passing between such Consuls. The Ambassador transmitted a note from the French Foreign Office to the effect that correspondence between the Department or the Embassy and consular officers in France would not be censored but that this exemption could not be extended to correspondence between American Consuls in France or between them and American Consuls in foreign countries. The Department informed the Ambassador:

The Department cannot accede to the position of the French Government with respect to the latter classes of consular mail. Our consuls are in France for official purposes and by permission of the French Government which may safely assume that they are engaged in no improper activities. They should, therefore, have the right freely to carry on correspondence between themselves and there is no justification for interference with that correspondence. You will please bring these views to the attention of the Foreign Office and express the expectation that in future all correspondence between American consular officers will be accorded the consideration to which it is entitled, including freedom from censorship.

The Acting Secretary of State (Welles) to the Ambassador in France (Bullitt), telegram 1429, Nov. 22, 1939, MS. Department of State, file 851.711/381; the First Secretary of Embassy (Barnes) to the Secretary of State (Hull), no. 544S, Dec. 14, 1939, and the Counselor of the Department of State (Moore) to Mr. Bullitt, no. 1910, Jan. 16, 1940, *ibid.* 851.711 388.

For other material concerning correspondence of both diplomatic and consular officers, see *ante*, ch. XIV, § 418; and see 1914 For. Rel. Supp. 535-543; 1915 For. Rel. Supp. 740-743; 1917 For. Rel. Supp. 2, pp. 1235-1236.

The American Chargé d'Affaires ad interim at Rome informed the Department of State in August 1940 that Italian censorship regulations permitted free communication by telegraph in any language or code between the Embassy and the Department and other American missions, that letters between the Embassy and American Consuls in Italy were not subject to censorship, but that correspondence between Consulates and between Consulates and the Department was subject to censorship. The Department instructed the Embassy to inform the Italian Foreign Office that "The Italian regulations which require that correspondence between the Consulates and between the Consulates and the Department be subjected to censorship constitute an unwarranted interference with official correspondence and do not

give reciprocity of treatment to American consular mail in Italy." The Department at the same time explained:

This Government does not interfere with mail sent by a consular officer in the United States to an addressee within or outside the United States. There are in force regulations with respect to the bringing into this country of securities but even under these regulations the following classes of mail and packages are not subject to interference:

(1) Sealed letters addressed to a consular officer by his Government or by a diplomatic officer or another consular officer of his Government and bearing the official seal of his Government;

(2) Official consular pouches; and

(3) Packages addressed to a consular officer bearing the official seal of his government and accompanied by certificates under such seal to the effect that they contain only official communications or documents.

The Italian Foreign Office requested that the existing regulations be considered as the result of the particular exigencies of the state of war.

The Chargé d'Affaires ad interim in Italy (Reed) to the Secretary of State (Hull), telegram 789, Aug. 5, 1940, and Acting Secretary Welles to Mr. Reed, telegram 381, Aug. 10, 1940, MS. Department of State, file 124.656/114; the Counselor of Embassy at Rome (Tittmann) to Mr. Hull (with enclosure), no. 2151, Feb. 18, 1941, *ibid.* /121.

The Foreign Service Regulations of the United States provide that "All official mail transmitted by or through Foreign Service offices to the United States shall be forwarded by diplomatic pouch whenever such facility is available" and that only the following types of extra-official and unofficial mail may be transmitted by diplomatic pouch to the Department of State:

Use of
official
pouch

(1) The private correspondence of officers and American employees of the Foreign Service and of their immediate families, and the correspondence of other American officials and employees of the United States Government stationed abroad, with members of their families or friends in the United States.

(2) Official mail of foreign governments, but only in accordance with the terms of the Department's circular instruction of December 27, 1937, D.S. No. 2874.

(3) Under exceptional circumstances and where it is essential in the interest of American trade, business letters from private individuals or firms, which must be forwarded in unsealed envelopes endorsed with the signature of the chief of-mission on the outside cover.

(4) As a temporary exception under unusual circumstances or where local postal facilities are inadequate, mail of represent-

atives of leading American charitable institutions, which must be forwarded in unsealed envelopes.

The regulations further provide that—

Extra-official and unofficial mail transmitted by diplomatic pouch shall not contain enclosures for third persons, nor shall money be transmitted. No merchandise, other than that for the strictly official use of the Government, shall be transmitted through the pouch.

For. Ser. Reg. U.S. VI-2, n. 25 (a), Jan. 1941; *ibid.* VI-3, nn. 5 (a) and (b), Jan. 1941.

**Customs
restrictions**

The American Consul at Maracaibo, Venezuela, reported to the Department of State in November 1912 that he had been required to open, in the presence of the postmaster on the suspicion that it contained unmailable matter, a piece of mail addressed to him. The Post Office Department, to which the matter was referred, advised that—

the Joint Regulations issued by the Treasury and Post Office Departments governing the treatment of dutiable and supposed dutiable articles received in the mails from foreign countries provide that, letters and sealed packages addressed to consuls bearing the seal of a foreign government, or enclosed in its official envelope, and which appear to contain only official documents, shall be immediately delivered to the addressees, but if the letters and sealed packages so addressed bear the appearance of containing merchandise, whether the letters or the packages be of an official or unofficial character, they are to be treated in the usual manner, namely: they must be opened by the addressee in the presence of the postmaster. When such letters or sealed packages are found to contain articles which require their seizure under our customs laws, they are so seized. It will be seen therefore, that the treatment accorded the Consul's mail at Maracaibo in the instance which you have brought to my attention is . . . such as might be accorded consuls' mail in this country.

Consul Ray to Secretary Knox, no. 59, Nov. 8, 1912, MS. Department of State, file 125.5816; the Second Assistant Postmaster General (Stewart) to Mr. Knox, Jan. 23, 1913, and Mr. Carr to Mr. Ray, Feb. 1, 1913, *ibid.* 125.5816/1. See Customs Regulations of the United States (1937), art. 361(c).

With reference to the refusal of United States postal officials to deliver to a Mexican consular officer, without examination in the presence of a customs officer, a package stamped "Supposed Liable to Customs Duty", the Department of State said that—

attention is invited to the fact that the delivery of such articles received by mail without customs examination is an act of courtesy and not a right reserved to the consular officer and that had the Mexican Consul at Norfolk acquiesced in the submission of the

article to the customs authorities it is probable that it would have been inspected and passed free by them without examination.

The Under Secretary of State (Clark) to the Mexican Ambassador (Téllez), Oct. 29, 1928, MS. Department of State, file 702.03/71.

In the course of correspondence between the Department of State and the War Department, concerning the exchange of communications between foreign consular officers in the Philippines and officials of the United States and of the Commonwealth, the Department of State, on July 7, 1937, communicated to the War Department the following proposed regulations:

With foreign
officials

I. Foreign consular officers stationed in the Philippines may appropriately address and appeal to the local authorities, throughout the extent of their consular districts, for the purpose of protecting the rights and interests of their nationals. Should the local authorities fail to give satisfaction, appeal may be made directly to the United States High Commissioner to the Philippine Islands who should bring the matter to the attention of the President of the Government of the Commonwealth of the Philippines. If that action should fail to effect a satisfactory adjustment, the High Commissioner will then refer the case to the Department of State and will so inform the foreign consular officer concerned. It is suggested that written communications addressed by foreign consular officers to the local authorities of the Commonwealth Government in Manila be prepared in duplicate and a copy forwarded to the High Commissioner; and that such communications addressed to officials of the Commonwealth Government outside of Manila be prepared in triplicate, one copy to be sent to the High Commissioner and one copy to the President of the Commonwealth. Replies by officials of the Commonwealth Government to communications from foreign consular officers should be transmitted through the President of the Commonwealth, and a copy of each reply should be sent to the High Commissioner by the President of the Commonwealth.

II. Subjects of a political character and questions relating to exequaturs, visits of foreign war vessels and airplanes, and other formal matters should be dealt with as usual through diplomatic channels, i.e., through the Embassy or Legation in Washington of the country concerned.

III. Official communications from the Commonwealth authorities to American diplomatic and consular officers should be sent to the High Commissioner for transmission over his signature to the diplomatic or consular officers concerned. American diplomatic and consular officers are being instructed to address official communications for the attention of the Commonwealth authorities to the High Commissioner for transmission.

The War Department approved and instructed the High Commissioner accordingly.

The Secretary of War (Woodring) to the Secretary of State (Hull), June 16, 1937, and Mr. Hull to Mr. Woodring, July 7, 1937, MS. Department

of State, file 702.0011B/8; Mr. Woodring to Mr. Hull (with enclosure), July 10, 1937, *ibid.* 702.0011B/10.

PROTECTION OF INTERESTS OF FELLOW NATIONALS

§441

By virtue of a treaty between the United States and Austria-Hungary permitting consular officers in the exercise of their duty to "apply to the authorities within their district, whether federal or local, judicial or executive, . . . for the purpose of protecting the rights of their countrymen" (1 Treaties, etc. [Malloy, 1910] 41), it was held by a United States Circuit Court in 1907 that an Austro-Hungarian Consul in the United States had the right to petition for an order restraining an American company from using the name of the Austro-Hungarian Emperor in its corporate name and his picture in its advertising literature, on the ground that they tended to misrepresent to Austro-Hungarian immigrants that the Emperor was in some way identified with the company.

Von Thodorovich v. Franz Josef Beneficial Ass'n., 154 Fed. 911 (E.D. Pa., 1907).

Represent-
ative char-
acter

The District Court of the United States for the Northern District of Ohio in 1914 sustained an action brought by an Austro-Hungarian Consul to have turned over to him the distributive shares due the surviving next of kin, residents and subjects of Austria-Hungary, of a deceased national of that country under the Workmen's Insurance Act of Ohio, which required that the shares be paid directly to the beneficiaries or to some person unquestionably representing them. The court, after referring to *The Bello Corrunes*, 6 Wheat. (1821) 152, and after examining the law of Austria-Hungary, decided that the Consul was fully authorized and qualified to act as the personal representative of fellow nationals, in the absence of a specific power of attorney from the beneficiaries to some other representative.

Vujic et al. v. Youngstown Sheet & Tube Co., 220 Fed. 390 (N.D. Ohio, 1914). See also *Hunko v. Buffalo Crushed Stone Company, et al.*, 203 App. Div. (3d Dept.) 284, 196 N. Y. Supp. 569 (1922).

In 1916 an Austro-Hungarian Consul instituted a proceeding in the courts of Oregon to recover, under the Oregon Employer's Liability Act, for the death of a fellow national. The plaintiff named was the deceased's mother, a subject and resident of Austria-Hungary. The defendant's attorneys challenged the authority of the plaintiff's attorneys to proceed in the matter merely upon the authority of a letter from the Consul and without a specific power of attorney from the plaintiff. The Supreme Court of Oregon reversed an order of

the lower court staying proceedings pending submission of further authority for the plaintiff's attorneys to act. The court based its ruling largely on the most-favored-nation clause in article XV of the consular convention of 1870 between the United States and Austria-Hungary, 1 Treaties, etc. (Malloy, 1910) 44, taken in conjunction with the provision of article VIII of the consular convention of 1871 between the United States and Germany that "especially in cases of the absence of [their countrymen] . . . Consuls etc. shall be presumed to be their legal representatives" (*ibid.* 552). The court referred to the difficulties of communication resulting from the fact that Austria-Hungary was then at war, and said that the plaintiff probably could, by appointing an attorney, supersede the authority of the Consul to act.

Ljubich v. Western Coöperage Co., 93 Oreg. 633, 184 Pac. 551 (1919). See also *Garvin, Alien Property Custodian v. Western Coöperage Co.*, 94 Oreg. 487, 184 Pac. 555 (1919).

In the absence of treaty provisions conferring upon diplomatic and consular officers of foreign countries in the United States the right to represent their nationals in the collection of money, the rights of these officers in such matters would appear to depend upon local laws applicable to the subject and upon the laws of the foreign countries defining the duties of their representatives in the United States.

The Third Assistant Secretary of State (Bliss) to the Deputy Commissioner of the Michigan Department of Labor and Industry (Derham), Aug. 14, 1922, MS. Department of State, file 711.0021/146.

An action against a railway company for wrongful death was instituted under a New York statute for the benefit of the deceased's heirs, who were nationals and residents of Russia. The defense was interposed that a prior cash settlement of the claim had been effected between the defendant and the Russian Consul General on behalf of the beneficiaries of this action. The Consul's right to act was predicated on a most-favored-nation clause in a treaty between the United States and Russia of 1832 (2 Treaties, etc. [Malloy, 1910] 1517), and on article 27 of the treaty of friendship and general relations of 1902 between the United States and Spain (2 Treaties, etc. [Malloy, 1910] 1709), providing that "so far as compatible with local laws" consuls shall have—

the right of representing the absent, unknown or minor heirs, next of kin or legal representatives of the citizens or subjects of their country, who shall die within their consular jurisdiction; . . . and of appearing either personally or by delegate in their behalf in all proceedings relating to the settlement of their estate until such heirs or legal representatives shall themselves appear.

The Court of Appeals of New York pointed out that beneficiaries acquired their right of action directly by virtue of the New York statute and not by devolution, i. e. the right did not belong to the decedent's estate. It said that while under general principles of international law consuls are entitled to protect the "property within their territorial jurisdiction of their countrymen dying therein" and to "interpose claims for the restitution of property belonging to the subjects of their own country, . . . [the court had found] no rule of international law or judicial decision indicating that it authorizes or permits them to dispose of, control, or convert into another form the uninherited and secure property of their living countrymen". As to the above treaty provisions, it said that their purpose was to assure the conservation, administration, and settlement of estates of citizens of either party who died within the territory of the other and that "It is the heirs, next of kin, or legal representatives of such citizens who are to be represented and represented as such." The right of action was upheld.

Hamilton, County Treasurer, etc. v. Erie Railroad Company, 219 N.Y. 343, 351, 353, 114 N.E. 399, 402, 403 (1916).

Interpo-
sition with
judicial
authorities

A local judge in Mexico City in 1910 informed the American Consul General who had approached him on behalf of an imprisoned American citizen that he could not receive him in his official capacity as Consul General, although he would be glad to confer with him in his private and personal capacity, as he would any American citizen. The Department of State informed the Consul General:

The right of a consular officer *officially* to confer with a foreign magistrate concerning the case of one of his fellow countrymen, pending before such magistrate, is a right recognized by the law of nations, and uniformly admitted by governments in their intercourse.

The instruction concluded:

The United States Consular Regulations instruct our consuls "to countenance and protect American citizens before the authorities of Foreign countries in all cases in which they may be injured or oppressed." (Paragraph 171). [Consular Reg. U.S. sec. 149, Mar. 1933; Ex. Or. Jan. 11, 1932.]

The right of a consular officer to confer officially with a foreign magistrate concerning the case of one of his compatriots pending before such magistrate, is clearly incident to the exercise of his right as natural protector of his countrymen. If the occasion arises in the future, you will, with due deference and all courtesy, claim this right under the general principles of the law of nations, and if the right is not accorded you, you will bring the matter

to the attention of our Embassy in Mexico, and of this Department.

Consul General Shanklin to Secretary Knox, no. 356, July 25, 1910, MS. Department of State, file 711.1221/-; the Director of the Consular Service (Carr) to Mr. Shanklin, no. 191, Oct. 7, 1910, *ibid.* 711.1221/1.

An American Consul General in Guatemala inquired of a local judge of first instance as to the status of a case of an American citizen imprisoned in that country and was requested to direct his communication "through the appropriate channel", which the Consul General understood to mean the Foreign Office. The Department of State instructed the Chargé d'Affaires in Guatemala to state to the Foreign Office that "the right of a consular officer officially to ask a local magistrate for information in relation to the case of one of his fellow-countrymen pending before such magistrate, is a right recognized by the law of nations and uniformly admitted by governments in their intercourse, and that this Government anticipates a courteous response to such inquiries". He was also instructed to request that general instructions be issued "in order that our consular representatives may be accorded the rights in this respect to which they are entitled by the rules of international law and the practice of civilized states".

Subsequently, the Guatemalan Government instructed local judges to inform foreign consular officers concerning cases involving their fellow nationals as to data concerning the nationality of the accused, the nature of the accusation, and the date on which the *sumario* in that particular case would probably be terminated.

Consul General Bucklin to Secretary Knox, no. 278, Sept. 5, 1912, MS. Department of State, file 711.1421/5; the Acting Secretary of State (Wilson) to the Chargé d'Affaires in Guatemala (Wilson), no. 178, Oct. 9, 1912, *ibid.* 814.112D29/1; Mr. Wilson to Secretary Bryan, no. 416, Apr. 14, 1913, *ibid.* 711.1421/14.

It should, of course, be unnecessary to remind the *de facto* Government in this connection, that consular representatives of the United States engaged upon their duties of protecting American citizens should receive courteous treatment at the hands of Mexican officials and be permitted free access to the court rooms, upon the occasion of the trial of their nationals for offences charged.

The Counselor for the Department of State (Polk) to C. B. Parker, acting in representation of American interests in Mexico City, no. 2049, Jan. 4, 1917, MS. Department of State, file 125.9233/101.

In 1922 an American Consul in Rumania addressed an inquiry to the judge of a Rumanian court as to when the case of an American citizen would be decided. He was told that the inquiry should be directed to the Foreign Office, whereupon the Legation brought the matter to the attention of the Foreign Office, pointing out that article IX of the

consular convention of 1881 between the United States and Rumania (2 Treaties, etc. [Malloy, 1910] 1507) granted consular officers "the right to address the administrative and judicial authorities . . . for the purpose of protecting the rights and interests of their countrymen". The Foreign Office took the position that the convention did not apply to judicial affairs in process of litigation, since such an intervention might be interpreted as interference with the judicial authorities and would be contrary to the spirit of the convention. The Department of State instructed the Legation to bring the matter again to the attention of the Foreign Office, with the following observations—

that the right of a consular officer to address the authorities in his district on matters pertaining to the rights and interests of nationals of his country appears to be generally conceded, but that, irrespective of this, such right is clearly granted to American consular officers in Rumania under the provisions of Article IX of the Consular Convention between the United States and Rumania of June 17, 1881. You will add that this Government, therefore, considers that since the communication which Consul Palmer addressed to the President of the Court of Appeals at Timisoara on April 27, 1922, was respectful in tone and contained a proper request for information concerning the status of the case of an American citizen pending in that court, the Consul was entitled to a courteous and responsive reply. You may state in this connection that an expression on the part of the Consul of his desire that the case might be terminated as soon as possible could not be construed as an attempt to exercise pressure on the court, since it does not appear that the Consul in any way raised any question as to the court's prerogatives in the matter.

In taking up this case with the Foreign Office you may state that in view of the fact that a consular officer seldom has occasion to address the judicial authorities in his district with regard to cases affecting the nationals of his country until after such cases have actually come before the judicial authorities, it is quite apparent that the interpretation which the Rumanian Government has given to Article IX of the Consular Convention referred to would practically preclude American consular officers from communicating with the judicial authorities in cases where the interests of American citizens might be involved.

You may inform the Foreign Office that so far as this Department is advised Rumanian Consular officers in this country are not prohibited from addressing the administrative or judicial authorities on matters pertaining to the interests of Rumanian subjects, and that the Department is aware of no distinction having been made with respect to cases actually pending before the courts.

The Foreign Office agreed in principle to the Department's position.

The *Chargé d'Affaires ad interim* in Rumania (Marriener) to the Secretary of State (Hughes), no. 242, July 3, 1922, and the Second Assistant

Secretary of State (Adee) to the Minister in Rumania (Jay), no. 141, Sept. 12, 1922, MS. Department of State, file 711.7121/13; Mr. Jay to Mr. Hughes, no. 394, Apr. 30, 1923, *ibid.* 711.7121/16.

In 1923 the Department of State sent the following instruction to Consul Palmer in response to his inquiry regarding the extent to which he was entitled to intervene with judicial authorities on behalf of American citizens under article IX of the consular convention of 1881 between the United States and Rumania:

in general a consular officer in Rumania should avoid acting as an attorney or participating in the conduct of a case pending before the courts or judicial authorities of that country. He should, however, see that the rights of American citizens are safeguarded and that they are not denied an opportunity to have legal redress or, if imprisoned, a prompt trial if there is an indication that the trial is being unduly delayed. He should also in the case of an arrest of an American citizen lend such assistance as may be possible and proper with a view to having the accused released on bail provided the alleged offense is not of so serious a nature as properly to preclude a release on bail.

Consul Palmer to Secretary Hughes, no. 854, May 14, 1923, and the Director of the Consular Service (Carr) to Mr. Palmer, Aug. 16, 1923, MS. Department of State, file 711.7121/18.

The German Foreign Office informed the American Embassy in 1936 that communications addressed by American Consuls to the Chief Attorney General in Oldenburg, requesting information concerning all American citizens imprisoned within the district, did "not seem suited for direct business communications between an American Consular representative and the supreme authority of a State" and requested that "they be presented through diplomatic channels". The Department of State instructed the Embassy to call the attention of the Foreign Office to article 21 of the treaty of friendship, commerce, and consular rights between the United States and Germany concluded in 1923, providing:

Consular officers, nationals of the State by which they are appointed, may, within their respective consular districts, address the authorities, National, State, Provincial or Municipal, for the purpose of protecting their countrymen in the enjoyment of their rights accruing by treaty or otherwise.

The Embassy was further instructed to say:

Since no treaty stipulations are required to enable consular officers to communicate through diplomatic channels, application of the procedure submitted by the Foreign Office in its communication to the Embassy would render illusory the specific treaty stipulations and in the circumstances it would appear that the necessary steps should be taken to the end that the

appropriate German officials may be advised of the propriety and stipulations under the Treaty of their receiving inquiries addressed to them by American consular officers.

The Foreign Office expressed the view that the treaty provision in question "refers only to the discussion of individual cases without fundamental significance".

Ambassador Dodd to Secretary Hull, no. 3155, Nov. 20, 1936, and the Acting Secretary of State (Moore) to Mr. Dodd, telegram 152, Dec. 23, 1936, MS. Department of State, file 362.1121/20; Mr. Dodd to Mr. Hull (with enclosures), no. 3282, Feb. 1, 1937, *ibid.* 362.1121/22.

**Visits to
imprisoned
nationals**

In the opinion of the Claims Commission, United States and Mexico, in the *Faulkner* case, it was said:

The allegation of the claimant . . . that he was not allowed for several days to communicate with his consul would, if proven, also have weight with the Commission. The Commission holds that a foreigner, not familiar with the laws of the country where he temporarily resides, should be given this opportunity.

Walter H. Faulkner (United States *v.* Mexico), Opinions of the Commissioners (1927) 86, 90.

. . . the Department holds that American citizens arrested in foreign countries should not be held *incommunicado*, but should be allowed to communicate with diplomatic or consular representatives of this country, and with the attorneys whom they wish to employ in their defense.

The Assistant Secretary of State (Olds) to the Ambassador to Chile (Collier), Oct. 21, 1925, MS. Department of State, file 325.1121 Stein, Charles/2.

. . . Regardless of the question of guilt, the Department considers that an American Consul should, within a reasonable time after the arrest, be permitted to visit an American national imprisoned in a foreign country.

Secretary Hull to Minister Summerlin, telegram 6, Apr. 14, 1934, MS. Department of State, file 331.1121 Pulido, Manuel/32.

Regulations having been adopted by the Swiss Government imposing restrictions upon visits by American consular officers to American citizens held for investigation, the Department of State, in January 1922, sent the following instruction to the Minister:

Bring these regulations to the attention of the Swiss Foreign Office and state that the Government of the United States considers that its consular officers should be permitted to interview American prisoners without restrictions upon the use of the English language and without the conversation being overheard by a Swiss official. You may add that American consular offi-

cers should be permitted to interview American prisoners promptly and that in order to avoid unnecessary delay it is hoped that such interviews will be permitted with as little preliminary formality as possible.

You may say finally that the Government of the United States hopes that the regulations referred to will be modified.

The Minister replied that, upon being informed of the restrictions, he had made informal inquiries at the Foreign Office and had been told that the position was maintained that international law does not confer upon consuls the right of visit or of free correspondence with their nationals under detention, the privilege being within the discretion of the authorities, and further, if visits or correspondence were permitted, the judge was within his rights in taking precautionary measures. It was further said that the regulations would be interpreted in the most liberal sense and in the broadest spirit of courtesy toward the consuls.

Consul General Murphy to Secretary Hughes, no. 245, Nov. 12, 1921, and Under Secretary Fletcher to Minister Grew, no. 16, Jan. 6, 1922, MS. Department of State, file 354.11/654; Mr. Grew to Mr. Hughes, no. 153, Feb. 1, 1922, *ibid.* 354.11/656.

With reference to difficulties encountered by an American consular officer in Germany in visiting an American citizen in prison, the Department of State, in September 1924, instructed the Embassy in Germany to state to the Foreign Office that—

this Government considers that American Consular Officers in Germany should be granted, in accordance with what it believes to be the accepted international practice, the courtesy of conferring with American citizens in prison in that country in order that the Consular Officers may render them the assistance to which they may be entitled; that these Officers should be permitted in such cases to converse with the prisoners in the English language and without the presence of a German official; and that it is hoped that any German regulations placing restrictions upon persons visiting German prisons will not be construed as applying to American Consular Officers.

The Ambassador subsequently reported to the Department that he had been informed that the appropriate German authorities had been instructed "to grant consuls of the United States, when practicable, admittance to prisoners of their nationality, as well as interviews with such prisoners in the English language without the presence of a police official".

The Under Secretary of State (Grew) to the Chargé d'Affaires ad Interim (Robbins), no. 3523, Sept. 29, 1924, and Ambassador Schurman to Secretary Kellogg, no. 54, July 18, 1925, MS. Department of State, file 362.1121 Stroyman, David.

Article IX of the consular convention of 1878 between the United States and Italy provides:

Consuls General, Consuls, Vice-Consuls, and Consular Agents may have recourse to the authorities of the respective countries within their district, whether federal or local, judicial or executive, for the purpose of complaining of any infraction of the treaties or conventions existing between the United States and Italy, as also in order to defend the rights and interests of their countrymen. If the complaint should not be satisfactorily redressed, the consular officers aforesaid, in the absence of a diplomatic agent of their country, may apply directly to the government of the country where they reside.

1 Treaties, etc. (Malloy, 1910) 979-980.

In connection with the detention in Italy, and subsequent release following investigation, of three American citizens, the Department of State in February 1926 sent the following instruction to the Ambassador in Italy:

. . . It seems that not only was no opportunity given to the Americans to communicate with the American Consul General . . . but that one of them was actually restrained by force from telephoning to the American Consulate General. Furthermore the Italian authorities at Naples failed to inform the Consul General of the detention of his compatriots until after they had been released.

.
The Department need hardly point out that the fact that American citizens were actually held incommunicado by the Italian authorities and that the Italian authorities failed to communicate with the American Consul General with regard to their arrest is a serious matter

In the circumstances, it is felt that the local authorities at Naples should express suitable apologies to the three Americans for the unwarranted treatment accorded them, and to the American Consul General for their discourtesy and laxity in failing to notify him promptly of the arrest of these men. It is further felt that the Italian Government will appreciate the advisability of issuing specific instructions with a view to preventing the recurrence of similar incidents.

The Italian Government explained that during the time the investigation was taking place the police were under no obligation by virtue of existing treaty or international usage to inform the Consul of the detention or to allow the prisoners to communicate with the Consul. The Department noted the Italian contention that the right in question was not specifically provided for by treaty nor established by generally accepted international usage and observed that the denial of such a right would appear seriously to curtail the practical

effect of the treaty provision providing for the recourse of consular officers to the authorities of the respective countries in order to defend the rights and interests of their countrymen. It remarked that "the act of holding persons under arrest *incommunicado* is one sufficiently unusual in this day and age as to afford proper grounds for this Government's request for explanations and assurances as to the future". The Chargé d'Affaires ad interim was instructed to bring these matters to the attention of the Foreign Office and to stress the convenience which would accrue both to the individuals concerned and to the local authorities of having a consular officer interpose his good offices at the earliest possible moment, in matters concerning knowledge of the language, local laws, customs, etc.

The Under Secretary of State (Grew) to the Ambassador in Italy (Fletcher), no. 456, Feb. 4, 1926; the Counselor of Embassy (Robbins) to the Secretary of State (Kellogg) (with enclosures), no. 965, Aug. 20, 1926; Mr. Grew to the Chargé d'Affaires ad interim (Robbins), no. 651, Nov. 9, 1926; MS. Department of State, file 365.112 Eagan, E. P. *et al.*

In another case, the Department of State instructed the American Ambassador in Italy as follows:

"Make vigorous representations . . . in regard to the Italian regulations and the practices of the Italian authorities which hamper, delay, or prevent communication between American citizens arrested in Italy and American consular officers. Point out that these regulations and practices make it impossible for consuls 'to defend the rights and interests of their countrymen' as provided for in Article IX of the Consular Convention of 1878 between the United States and Italy. Express the hope that the custom, which formerly obtained in Italy, of notifying consular officers immediately upon the arrest of American citizens will be adhered to in the future. (See Instruction No. 651 of November 9, 1926 [*ante*]). . . . Insist that consular officers be permitted to visit and converse with American citizens incarcerated in Italy and that such visits be not delayed by unnecessary administrative procedure, and that such conversations be not hampered by the undesired presence of third parties."

With reference to the reply of the Italian Government that consuls would be permitted to visit prisoners only according to regulations which imposed some restrictions, at the discretion of the judicial officer, the Department in Sept. 1931 instructed the Ambassador to inquire as to the reasons upon which this position was said to be justified, in the light of international practice permitting consuls to visit their fellow countrymen when under arrest, as well as under treaty provision. The Ambassador, on Mar. 15, 1932, transmitted a memorandum of the Italian Foreign Office setting forth its views as follows:

"2. A consular officer may consult a citizen of the country which the former represents upon permission issued, normally, after preliminary examination of the person under arrest, by the public safety or judiciary authorities handling the case, provided that there is no supreme interest of justice or other peculiar consideration which prevents such permission being given.

"3. Although the Italian authorities are not under any obligation to inform foreign consular authorities of arrests of foreign citizens in the

Kingdom, nevertheless in accordance with requests made in this connection by representatives of foreign states, the interested representatives will be notified through the Ministry of Foreign Affairs of the arrest of foreign citizens in Italy, with right to reciprocity and in all cases provided that there are no special reasons to prevent such procedure.

"4. As to the possibility for consular authorities to confer with foreign citizens under arrest in Italy, if the conversation takes place during the period of preliminary examination of the arrested person, the presence of a public safety officer or custodian is provided for by legislation now in effect; if the preliminary examination has been concluded, the conversation may take place without the presence of third persons, provided there is no reason to the contrary."

The Department then instructed the Ambassador to acquaint the Foreign Office with the following views:

"... There is no treaty obligation imposed on the officials of either country to notify consular officers of the arrest of their countrymen. The memorandum from the Ministry of Foreign Affairs in paragraph 3 points this out. On the other hand, the practice in this country is to permit the arrested alien himself to notify the consular officers of his country of his arrest. This procedure is deemed essential in order to permit the consular officers of Italy in proper cases to perform their duties under Article IX of the Consular Convention of 1878 between the United States and Italy. . . .

"... it is not perceived that the supreme interests of justice or other peculiar considerations can be held to preclude altogether, in certain cases, consular officers being permitted to consult a citizen of their country who has been arrested. In such cases it would not be practicable for consular officers to carry out their function under Article IX of the Consular Convention of 1878 Unless permitted to communicate with all arrested citizens, a consular officer would not be in a position to ascertain their rights and interests which it is his duty to protect.

"As to the fourth paragraph of the memorandum of the Ministry of Foreign Affairs, while it is not urged that American consular officers should in all cases be permitted to communicate with arrested American citizens in private, it is believed that in most cases consular officers should be permitted to confer with arrested citizens of their country in the absence of local public officials. The essential factor, however, is that a conference should be permitted promptly, after the arrest has been effected and a sufficient time in advance of trial to permit the arrested person to secure the consul's assistance in making provision for his defense."

The Acting Secretary of State (Carr) to the Ambassador in Italy (Garrett). telegram 118, July 25, 1931, MS. Department of State, file 365.1121 Slavich, Nikola/14; the Acting Secretary of State (Castle) to Mr. Garrett, telegram 133, Sept. 4, 1931, *ibid.* /27; Mr. Garrett to Secretary Stimson (with enclosures), no. 1319, Mar. 15, 1932, *ibid.* /30; the Assistant Secretary of State (Rogers) to Mr. Garrett, no. 623, Apr. 28, 1932, *ibid.* /31.

A number of countries whose juridical systems are based on the civil law make explicit provisions in their codes for a period of preliminary examination, the *sumaria*, during which a prisoner may be held incommunicado.

The Department of State, on March 27, 1931, instructed the Ambassador to Chile to say to the Chilean Foreign Office with reference to an earlier note that—

of course it was not its intention to infer even by implication that American citizens in Chile are not subject to Chilean laws. The system of *incommunicado* is not recognized in American jurisprudence where the right of habeas corpus is considered as the foundation of American political liberties. Therefore when an American citizen is held *incommunicado* in a foreign country it is the fixed policy of the Government of the United States to request in each case that his diplomatic and/or consular representatives and his lawyer be permitted to see him in order that proper steps may be taken to safeguard his interests and prepare for his defense.

Secretary Stimson to Ambassador Culbertson, telegram 15, Mar. 27, 1931, MS. Department of State, file 325 1121 Bethune, Larry K./13.

The Department in Mar. 1917 instructed the Minister in Honduras to inform the Minister for Foreign Affairs that it—

"... cannot allow to pass unnoticed the action of the officials of Honduras in summarily imprisoning an American citizen, holding him *incommunicado* for an apparently illegal length of time ...

"... this Government does not doubt that it will receive assurances from the Government of Honduras that under no circumstances will American citizens in future be arrested and held *incommunicado* in contravention of their legal rights."

The Counselor for the Department of State (Polk) to the Minister in Honduras (Ewing), no. 132, Mar. 7, 1917, MS. Department of State, file 315.1128a5/2.

In instructing the Minister in Venezuela to present a claim for indemnity on behalf of an American citizen, the Department said:

"... the Department is constrained to observe that although the authorities may have been justified in detaining him for a reasonable time for investigation, their action in tying him to a post, placing him in irons, and holding him in prison *incommunicado* for a long period of time without trial was entirely unjustifiable." Secretary Hughes to Minister Cook, no. 917, Jan. 2, 1925, MS. Department of State, file 381.11C21 Laborda, Alberto.

The United States-Mexican Claims Commissioners on Oct. 15, 1928 in considering the claim of the United States on behalf of Jacob Kaiser observed that during the claimant's imprisonment in Mexico several of his letters were detained during the statutory period of *incommunicado* of 72 hours and that friends were prevented from seeing him for 3 weeks. The Commissioners concluded unanimously that "The foregoing involves no violation of either Mexican or international law." *Jacob Kaiser* (United States v. Mexico), Opinions of the Commissioners (1929) 80, 85.

The General Claims Commission, United States and Mexico, said:

The Commission is not prepared to state that a law which permits the *incomunicación* of an accused in a manner implying neither cruelty nor interference with the right of defense, is in

violation of international law. The *incomunicación* permitted by the Code of Criminal Procedure of Zacatecas (Article 340) must take place in such a manner as not to prevent the giving to the person so held all the assistance compatible with the object of that measure; the person held *incomunicado* may speak to other persons or communicate with them in writing, in the discretion of the Judge, provided that the conversation takes place in the presence of this official or that the letters be sent through him unsealed. Under these conditions, and if it does not totally prevent the accused from having an attorney to defend him, *incomunicación* does not imply a violation of international law.

Joseph A. Farrell (United States v. Mexico), docket 282, Opinions of the Commissioners (1931) 157, 161.

In 1931 the American Consul at Barranquilla, Colombia, protested to the Governor against the action of the local police in holding an American citizen *incomunicado*. The Consul claimed that such action was prohibited by article 13 of the treaty of peace, amity, navigation, and commerce concluded between the United States and Colombia in 1846. 1 Treaties, etc. (Malloy, 1910) 305. The Governor replied that Colombian legislation expressly provided for a period of *incomunicado* of 24 hours and stated that this practice was not contrary to the treaty provision. Consul Warren to Secretary Stimson, no. 234, May 2, 1931, MS. Department of State, file 321.1121 Berstein, Martin/2.

In a memorandum of April 23, 1932 the Legal Adviser of the Department of State said that "It is, of course, inconceivable that a prisoner should be held *incomunicado* indefinitely, but I doubt whether we can say that, as a matter of international practice, a prisoner cannot be held *incomunicado* for a reasonable time after arrest until questioned by the police or other investigating authorities."

MS. Department of State, file 300.1121 *Incomunicado*/7.

With reference to a complaint of the Mexican Embassy that officials in California had refused to permit a Mexican Consul to visit a Mexican citizen who was in jail, the Department of State informed the Governor of California:

Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if attitude District Attorney is maintained in instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens.

It is earnestly requested that you take prompt action looking to reversal District Attorney's position.

It was subsequently decided that the Consul would be permitted to visit the prisoner with the latter's attorney.

The Mexican Embassy to the Department of State, Apr. 9, 1934, MS. Department of State, file 311.1221 Aragon, José/1; Secretary Hull to Governor Rolph, telegram of Apr. 10, 1934, *ibid.* 311.1221 Aragon, José/3; Mr. Rolph to Mr. Hull, telegram of Apr. 12, 1934, *ibid.* 311.1221 Aragon, José/4; the Department of State to the Mexican Embassy, Apr. 13, 1934, *ibid.* 311.1221 Aragon, José/6.

In 1934 the Mexican Embassy in Washington informed the Department of State that a letter addressed by a Mexican Consul to a Mexican citizen confined in a Federal penitentiary had been returned with the statement that communications addressed to prisoners were required to be in the English language. The Department of State brought the matter to the attention of the Attorney General, offering no comment except to state that American Consuls in Mexico appeared to enjoy the privilege of corresponding in English with American prisoners in that country. The Attorney General replied that instructions were being issued permitting *bona-fide* communications to pass between nationals in Federal institutions and their consular representatives in their native language.

The First Secretary of the Mexican Embassy (Fuentes) to the Chief of the Division of Mexican Affairs (Reed), Apr. 13, 1934, MS. Department of State, file 311.1221 Zamora, Luis/1; the Assistant Secretary of State (Welles) to the Attorney General (Cummings), Apr. 23, 1934, *ibid.* 311.1221 Zamora, Luis/2; Mr. Cummings to Secretary Hull, Apr. [? May] 2, 1934, *ibid.* 311.1221 Zamora, Luis/4.

In 1936 the Italian Chargé d'Affaires ad interim in Washington inquired whether "whenever a foreigner is arrested or held in the United States the consular representative of his country is notified accordingly". The Department said: "The authorities of this Government to whom this question was referred state that while it is not the general practice to notify the consular representatives of a foreigner who is placed under arrest, such notification would promptly be made upon request therefor by the arrested person."

The Italian Chargé d'Affaires ad interim (Rossi Longhi) to the Secretary of State (Hull), Aug. 31, 1936, MS. Department of State, file 311.0021/8; Mr. Hull to the Italian Ambassador, Oct. 24, 1936, *ibid.* 311.0021/10. See, in this connection, the Deputy Commissioner of Immigration and Naturalization of the Department of Labor (Wixon) to Mr. Hull, Sept. 21, 1936, *ibid.* 311.0021/9; Attorney General Cummings to Mr. Hull, Sept. 21, 1936, *ibid.* 311.0021/10.

"It is the practice of the United States to allow foreign diplomatic and consular officers to visit their nationals who have been imprisoned. If any exception to this rule should be made by local authorities, the Department would take steps immediately to see that permission should be promptly granted." The Acting Secretary of State (Carr) to the Ambassador in Peru (Dearing), telegram 15, Mar. 23, 1931, MS. Department of State, file 325.1121 Bethune, Larry K./8.

NOTARIAL SERVICES

§442

Section 1750 of the Revised Statutes of the United States, derived from an act of Congress approved August 18, 1856 (11 Stat. 61), provides that "Every secretary of embassy or legation and consular officer is hereby authorized whenever he is required or deems it necessary or proper so to do, at the post, port, place, or within the limits of his embassy, legation, or consulate, to administer or to take from any person an oath, affirmation, affidavit, or deposition, and to perform any notarial act which any notary public is required or authorized by law to do within the United States." The section also provides that such acts, when certified under the officer's hand and seal of office, shall be as valid within the United States as if performed by or before a duly authorized person within the United States. A penalty is prescribed for perjury.

22 U.S.C. §131.

The act approved April 5, 1906 (34 Stat. 101) provides that every consular officer of the United States "is hereby required, whenever application is made to him therefor, within the limits of his consulate, to administer or take from any person any oath, affirmation, affidavit, or deposition, and to perform any other notarial act which any notary public is required or authorized by law to do within the United States" and to collect such fee therefor as may be prescribed by the President.

22 U.S.C. § 98. The Foreign Service Regulations of the United States, section X-5, Jan. 1941, based on the above statutes, stipulate that "In the absence of statutory enactment on the subject, diplomatic officers, except ambassadors and ministers, may, and consular officers shall, perform within the confines of their districts such notarial acts as a notary public is authorized to perform under the general law and according to the usage of nations, provided a request is made for such services or their performance is deemed necessary." Ex. Or. 8292, Nov. 30, 1939. This section supersedes sections 482 and 483 of the Consular Regulations of the United States (Dec. 1936) referred to in some of the correspondence appearing in this section, *post*.

Where an American citizen in France requested the American Consul General to decline to take an affidavit of residence which he thought would be presented by his minor child, stating that the request was for the child's protection, the Department of State instructed the Consul General that there appeared to be no legal authority for declining to take an affidavit when requested to do so.

Assistant Secretary Carr to Consul General Thackara, June 23, 1923, MS. Department of State, file 193.55/836.

The performance of notarial services is mandatory upon consular officers (Section 482 of the Consular Regulations); and the consular office is the usual and appropriate place for the performance thereof. Such services will, as stated in Note 10 to Section 482, of the Consular Regulations, be rendered elsewhere than at the consular office only in exceptional circumstances when it is shown that it is not possible for the parties to attend at the consulate.

The Assistant Secretary of State (Carr) to the Consul General at Dublin (Balch), Feb. 13, 1935, MS. Department of State, file 193.55/708.

The Consular Regulations of the United States, section 483, note 2, Dec. 1936, provided that "*The personal appearance of the signer of the document before the consular officer is indispensable.*"

If it is difficult for a person to appear before the consul for the purpose of signing the document he may arrange to sign before a local notary and have the official character of the notary certified by the consul. The Director of the Consular Service (Carr) to the Consul General at Large (Eberhardt), Dec. 9, 1916, MS. Department of State, file 193.55/144. See also the Chief of the Consular Bureau (Hengstler) to the Consul at Sydney (Lawton), Apr. 25, 1924, *ibid.* 193.55/364; the Assistant Secretary of State (Harrison) to the Consul at Cartagena (Schnare), July 16, 1926, *ibid.* 193.55/455.

"It makes no difference that the applicant for such services [notarial] resides without the Consul's district or even without the country where the Consul is stationed." The Department of State to the Consul at Rotterdam (Foster), Apr. 14, 1932, MS. Department of State, file 081.56/56.

When it is contemplated that an oath in the English language is to be administered to a person who is unfamiliar with that language, the entire document to which it is desired that he swear, together with the form of the oath affixed thereto, should, of course, be read over and carefully explained to him in a language with which he is familiar, if that be possible. In other words, it should be apparent that he is fully cognizant of the act which it is desired that he perform. . . .

The same general procedure should, by analogy, be followed with respect to the matter of taking acknowledgments.

The Consul at Bucharest (Palmer) to the Secretary of State (Hughes), no. 1378, May 26, 1924, and the Assistant Secretary of State (Carr) to Mr. Palmer, July 11, 1924, MS. Department of State, file 193.55/372.

Acting consular agents of the United States are not authorized to perform notarial acts since the authority is limited by statute to a "consular officer". Officers who may act

The Director of the Consular Service (Carr) to the Consul General at Mexico City (Shanklin), no. 603, Oct. 21, 1913, MS. Department of State, file 312.11/2643. See Rev. Stat., sec. 1674 (22 U. S. C. §51), defining "consular officers".

In 1920 when Spanish Consuls were representing American interests in certain Central European countries pending the conclusion of treaties of peace, the question was raised whether members of American missions unofficially in those countries could perform notarial services for American citizens. The Department of State replied in the negative, referring to the two statutory provisions governing the matter (22 U. S. C. §§ 98, 131), which, it was said, "specifically limit the performance of notarial services to *diplomatic* and *consular* representatives *at their official posts or stations*". The Department added:

It is of course possible that certain *State* statutes may give authority to American diplomatic or consular officers generally to authenticate documents without limitation as to place, and a broad construction of such statutes would seem to include duly commissioned members of the American diplomatic or consular services attached or assigned to American Commissions in enemy countries. Such diplomatic and consular officers are, apparently, in the same position in these cases as are Spanish consular officers in enemy countries, i.e., they have no authority under federal statute to perform notarial acts but might derive such authority from the laws of a particular state.

The Second Assistant Secretary of State (Adee) to the American Commissioner at Budapest (Grant-Smith), no. 307, Nov. 26, 1920, MS. Department of State, file 125.0064/1.

Pending the resumption of diplomatic relations between the United States and Germany, the Department of State replied to inquiries as to the method of obtaining notarial services in that country by referring the inquirers to Spanish diplomatic and consular officers in Germany who were stated to be in charge of American interests. The question whether an acknowledgment executed before a Spanish Consul would be recognized in the various States of the United States was said to depend upon the local law of those States and to be a matter not within the purview of the Department. Like replies were made to inquiries concerning notarial or other similar services in other countries with which the United States had not resumed diplomatic relations. The Second Assistant Secretary of State (Adee) to Messrs. Parker, Marshall, Miller, and Auchincloss, Feb. 25, 1921, MS. Department of State, file 193.55/215; the Director of the Consular Service (Carr) to A. Pessenlehner, Aug. 19, 1921, *ibid.* 193.5/52. To similar effect, see Mr. Carr to Messrs. Healy, Thomas and Healy, May 13, 1921, *ibid.* 193.55/226; Mr. Carr to Messrs. Bronner and Ward, July 3, 1920, *ibid.* 193.5/28; Mr. Carr to John W. Steward, July 29, 1920, *ibid.* 193.5/30; Mr. Adee to Frank E. Donnelly, Jan. 29, 1919, *ibid.* 193.55/178.

In a communication from an American company to the Department of State it was explained that a deed had been acknowledged in Mexico City before the Brazilian Vice Consul and sealed with the seal of the American Consulate General with the added notation that "The American Consulate being closed and its duties having been conferred upon this Consulate, I hereby certify this document." Registration of the

deed had been refused by New York County officials, and inquiry was made whether "the Brazilian Vice-Consul was for all purposes the American Consul at the time of taking said acknowledgment." The Department of State replied:

You are informed that Mr. Matthiesen was for some time in charge of the American Consulate General at Mexico City, but that no consular or other commission was issued to him by this Government inasmuch as this is prohibited by the Constitution of the United States.

The legal validity of the above mentioned document is, of course, a matter for determination under the laws of the State of New York, and is one over which this Department has no control.

New York Title Insurance Company to Secretary Lansing, June 12, 1916, and the Director of the Consular Service (Carr) to the New York Title Insurance Company, June 20, 1916, MS. Department of State, file 193.55/130. To similar effect, see Mr. Lansing to Senator Martin, Jan. 11, 1917, *ibid.* 193.55/146.

Replying to an inquiry regarding the execution of notarial documents for American citizens by a British Consul, the Department of State said that—

the Department is unable to authorize this as the validity of the notarial execution of a document depends upon the law of the State in which it is to be used. These state laws usually designate an American minister or consular officer as the only persons before whom such documents can be legally executed, and the Department is unable, under Article I, Section 9, of the Constitution of the United States, to appoint the British consular officer as an American consul or authorize his use of the American consular seal.

The Acting Secretary of State (Wilson) to the Assistant Secretary of War (Oliver), May 27, 1909, MS. Department of State, file 19938.

The Foreign Service Regulations of the United States, section X-5, note 9, January 1941, provide:

. . . Officers are not required to perform notarial services for aliens in connection with documents for use in foreign countries. However, officers may perform such services on behalf of citizens or subjects of countries with which the United States has formal diplomatic and consular relations, provided that the applicant for such service furnishes satisfactory evidence that the officer's certificate would satisfy the requirements of the law of the country where the document is to be used; that the service is legally necessary and cannot be obtained otherwise than through the American diplomatic or consular officer without loss or serious inconvenience to the applicant; and that the certificate will be used solely for the purpose for which it is requested.

Services
for aliens

An American Consul in the Netherlands in 1919 raised the question whether he should perform notarial services in connection with claims

of German citizens against the Alien Property Custodian, to which the Department replied that there was no authority of law for limiting these services and that he should take oaths of German or other enemy nationals.

Consul Listoe to Secretary Lansing, telegram of Nov. 1, 1919, and Mr. Lansing to Mr. Listoe, telegram of Nov. 6, 1919, MS. Department of State, file 193.5/21. To the same effect, see the Director of the Consular Service (Carr) to Consul Olivares, no. 164, Mar. 5, 1919, *ibid.* 193.55/177.

In 1924 when there were no diplomatic relations between the United States and Turkey, a Turkish national in Cuba requested the American Consul General to take his acknowledgment of a document appointing an attorney in Constantinople (Istanbul), there being no Turkish Consul in Cuba. The Department instructed the Consul that in as much as the United States had no formal diplomatic or consular relations with Turkey it was deemed inadvisable to take the acknowledgment. Consul General Hurst to Secretary Hughes, no. 1685, Feb. 26, 1924, and Mr. Hughes to Mr. Hurst, telegram of Mar. 13, 1924, MS. Department of State, file 193.55/359.

An American Consul General in Brazil inquired, in 1934, as to whether he should perform notarial services at the request of a German company on documents to be used in connection with shipments between Germany and Brazil. The notarizations were required by the Berlin branch of an American bank participating in the transaction. The Department of State replied:

"While it is mandatory upon consular officers to perform notarial services, the Department has always held that a consular officer should not, as a rule, perform such services for aliens in connection with documents to be used in countries other than the United States, particularly so if the applicant has consular representation. While Note 3 to Section 482, Consular Regulations, provides that in certain circumstances consular officers may perform notarial services, in connection with documents intended for use in countries other than the United States, for citizens or subjects of countries with which the United States has diplomatic and consular relations, the services are considered as not mandatory. In countries where such citizens or subjects have consular representation, the provisions of the above-mentioned note are held not to apply if the documents are intended for use in countries other than the United States.

"If the documents mentioned by you are for use in Germany, it would seem that any notarial services in connection therewith should be performed by a German consular officer in order, possibly, to render the documents acceptable in Germany; and the applicants should be informed accordingly.

"If, however, notwithstanding the foregoing, the applicants should insist that the services in this case be performed by an American consular officer, and, particularly, since an American concern is primarily interested, you should not refuse to perform the services, irrespective of where the documents may be used, provided they should be presented in proper form."

Assistant Secretary Carr to Consul General Lee, Mar. 26, 1934, MS. Department of State, file 193.55/677. See also the circular instruction to consular officers, May 14, 1925, no. 965, *ibid.* 193.55/415a; Mr. Carr to Consul General Washington, Nov. 7, 1925, *ibid.* 193.55/433.

The Foreign Service Regulations of the United States, section X-5, note 4, January 1941, provide:

Authority of officers of the Foreign Service to perform notarial acts under State or Territorial laws. State laws
Ambassadors and ministers may perform notarial services for use within a State or Territory *only* in those instances where the State or Territory requires that the documents for use in its courts be certified by an ambassador or minister. The requesting authority should, in such cases, be informed that an ambassador or minister has no authority under Federal laws to perform notarial services.

In the absence of a statutory enactment by a State or a Territory on the subject, other diplomatic and consular officers have authority to perform such services as are within the powers of a notary public according to general law and commercial usage. In such cases, the person requesting or requiring the service shall be informed, preferably in writing, of the absence of specific authorization for the officer to perform the service in order that the officer may be relieved of responsibility in the event the notarial act is subsequently rejected or refused recognition under the State or Territorial law. A notation to the effect that such information has been given the requesting person shall be entered in the Record of Fees. When the form of a document has been prepared by the attorneys for the signers thereto, officers shall use the form prepared unless it is manifestly incorrect.

When an officer is requested to perform a service outside the scope of the general powers of a notary public, or when a person applying for the performance of a notarial act does not specify the form in which the act shall be performed, officers shall be guided by the Synopses of Laws, an unofficial publication distributed by the Department of State. No responsibility is assumed by the Department nor shall the officer assume any responsibility for the accuracy of the information contained in this publication.

With reference to an inquiry concerning the propriety of administering an oath to a subscribing witness, the Department of State said:

"If the procedure will satisfy the requirements of the law of the particular State in which a document is to be used, a Foreign Service officer may certify the signature or signatures of witnesses to a document only when the services of a foreign notary public or other official in a consular district are not available to the person or persons who execute the document and when the witness or witnesses to the execution of the document or their signatures are personally known to the officer concerned.

"Since a Foreign Service officer alone is responsible for the proper and faithful performance of a notarial act, the Department is not in a position to state what proof such officer might require a witness or witnesses to submit in order to establish their identity in cases of the character to which you refer."

The Chief of the Division of Foreign Service Administration (Davis) to Emanuel Strahl, May 22, 1939, MS. Department of State, file 193.55/872. See also the Chief of the Division of Foreign Service Administration (Hengstler) to Messrs. Nippert and Nippert, Dec. 12, 1935, *ibid.* 193.55/742;

Assistant Secretary Carr to Consul Ellis, June 26, 1933, *ibid.* 193.55/651;
Mr. Carr to Consul Kehl, Mar. 5, 1929, *ibid.* 193.55/537.

The Foreign Service Regulations of the United States, section X-5, January 1941, provide:

Acknowledgments

NOTE 18. *Certificate of acknowledgment.* When a person who has executed an instrument appears personally before an officer and makes acknowledgment thereof, the officer shall execute a certificate of acknowledgment. Form No. 88, Certificate of Acknowledgment of Execution of an Instrument, is provided by the Department for general use or adaptation by the officer in executing such certificate. However, an officer shall be careful to assure himself that this form satisfies the requirements of the particular jurisdiction in which the document will be put into effect or recorded.

NOTE 19. *Instructions in connection with execution of Form No. 88.* In executing Form No. 88, officers shall be careful to follow the instructions given below:

(b) *Phrase "duly commissioned and qualified."* Care shall be taken that the executing officer is competent to execute the certificate under the laws of the jurisdiction in which it is to be used. Acting consular agents are not competent to perform notarial acts.

(d) *Phrase, personally appeared."* The personal appearance of the party making the acknowledgment before the executing officer is essential for the validity of the acknowledgment.

To same effect as (d), see the Director of the Consular Service (Carr) to the Consul General at Vienna (Denby), no. 103, July 9, 1913, MS. Department of State, file 193 5/3; the Assistant Secretary of State (Harrison) to the Consul at Cartagena (Schnare), July 16, 1926, *ibid.* 193.55/455.

On the subject of consular functions with respect to the taking of testimony in foreign countries for use in the United States, see the Foreign Service Regulations of the United States, section X-5, notes 23-34, January 1941. Note 29 reads in part:

Depositions

Procedure for taking depositions or executing commissions to take testimony. In taking a deposition on notice or executing a commission to take testimony, an officer of the Foreign Service shall conform to any statutory enactments on the subject in the jurisdiction in which the deposition is to be used and shall comply with any special instructions which may accompany the request or commission. In the absence of special instructions or statutory enactments, the officer may follow the procedure outlined below in taking a deposition.

(a) *Request the attendance of witnesses or production of records.* The officer shall, at the request of any party to the action or proceeding, request witnesses, whose testimony is sought, to

appear before him, or request designated persons to supply to him, or to the party making the request, records or other documents in their hands, or copies thereof.

Note 30 provides:

Objections of local government to taking of testimony by officers of the Foreign Service. Where the local government objects to the taking of testimony by an officer of the Foreign Service and in the absence of any treaty securing this right to the officer, the officer should return the papers with an explanation of the reasons why he is unable to take the deposition and with any suggestions he may be able to make as to the proper method of obtaining the testimony—whether by letters rogatory or otherwise.

In answering inquiries from persons desiring to obtain testimony by means of depositions, the Department of State customarily encloses a statement which reads:

A consular officer has no authority to compel attendance of a witness at his office for the purpose of taking testimony, and this is particularly applicable in the case of foreign subjects. Some governments do not permit consular officers to take depositions of their subjects or citizens. However, in those countries where there is no objection raised by the government, and when the persons whose testimony is required appear voluntarily to give it, the law quoted above is applicable [22 U.S.C. §98].

The question as to whether a deposition taken by a consular officer will be acceptable in the courts of any particular State depends, of course, upon the laws of the State in which it is to be used, which laws should be consulted as to the above-mentioned consular officer's authority to take the deposition desired by you.

In view of the divergences in the requirements of the courts of the several states of the United States with respect to the forms to be followed in the taking of depositions, you should send full and explicit instructions in the matter, in order that the deposition, when completed, may be legally unobjectionable in the court of the State in which it is to be used.

The Department of State, in 1910, informed the British Ambassador that, subject to any special legislation of the States, there was no objection to the taking by British consular officers in the United States of the testimony of British subjects, as well as of American citizens or subjects of third countries, provided the testimony be given voluntarily and that American consular officers in Great Britain be accorded reciprocal privileges. In reply to a further inquiry from the Ambassador as to whether there was objection to persons other than consuls taking testimony under commission, and stating that the British Government had no objection to the examination of witnesses in that country by any person duly authorized by courts of the United States, the Department said that, subject to the reservation of the note above referred to, it had no objection. Ambassador Bryce to Secretary Knox, Mar. 28, 1910, and Mr. Knox to Mr. Bryce, May 19, 1910, MS. Department of State,

file 24203; Mr. Bryce to Mr. Knox, June 27, 1910, and the Acting Secretary of State (Wilson) to Mr. Bryce, July 15, 1910, *ibid.* 24203/1. See also 1910 For. Rel. 592-594.

"... the Department draws your attention to the fact that under Article 10 of the Consular Convention of 1878 between the United States and Italy, Consular Officers are only authorized to take the deposition of subjects or citizens of their own country. Whether they may also take the depositions of nationals of the country in which they exercise their functions or of nationals of third countries, and the procedure to be followed in obtaining such testimony, must be determined by reference to the laws of the jurisdiction in which it is desired to obtain testimony." The Director of the Consular Service (Carr) to the Consul in Turin (Sycks), Dec. 27, 1923, MS. Department of State, file 865 04511/2.

With reference to the somewhat similar article XXII of the treaty of 1923 between the United States and Germany (4 Treaties, etc. [Trenwith, 1933] 4200), the Department in 1928 informed the German Embassy that, although American citizens might presumably give their depositions voluntarily to German consular officers, violation of their oath would not constitute perjury, since it would not be a case in which "a law of the United States authorized an oath to be administered" (18 U.S.C. §231). It was ascertained at the same time that Germany adhered to her position taken in 1874 disapproving the taking of depositions of German nationals by American consuls in Germany (1874 For. Rel. 446). MS. Department of State, file 711.622/101, /111. See also 1923 For. Rel., pt. II, p. 26.

"While the taking of depositions is a duty imposed upon the American consular officers by statute, it is the opinion of the Solicitor of this Department that the consular officer is not required to 'find the witnesses', 'induce them to present themselves and testify', or 'to make comparison of church records.' These duties are neither notarial duties nor consular duties, but are rather duties of an attorney or agent of the parties in interest, and their performance is not imposed upon the consular officer by law or regulations.

"... The consulate is the usual and appropriate place for the performance of such services and the cases in which the consul might be required to go to the parties, rather than requiring the parties to come to him, are exceptional and such, for instance, as attending a man at his death-bed."

The Director of the Consular Service (Carr) to Messrs. Kernan and Kernan, Jan. 21, 1911, MS. Department of State, file 081.63G51/-.

In 1933 an American Consul noted an exception in his certificate to a deposition to the effect that answers made by deponents to certain interrogatories concerning their personal status were probably inaccurate by virtue of certain provisions of local law. The Department instructed him that "since the reason for the exception is noted in his certificate attached to the testimony, his action thereon is, in the circumstances, approved." It was suggested that witnesses be specifically notified when it is deemed necessary to include an exception in the consul's certificate. Consul Shaw to Secretary Hull, no. 411, Nov. 8, 1933, and Assistant Secretary Carr to Mr. Shaw, Nov. 23, 1933, MS. Department of State, file 193.55/665; Mr. Shaw to Mr. Hull, no. 413, Nov. 29, 1933, and the Department of State to Mr. Shaw, Dec. 9, 1933, *ibid.* 193.55/666.

The act of Congress approved June 20, 1936 (49 Stat. 1561-1564), section 2, defines foreign documents and provides that they shall be admissible in courts of the United States in criminal proceedings "when duly certified as hereinafter provided . . . if the court shall find, from all the testimony taken with respect to such foreign document pursuant to a commission executed under the provisions of this Act, that such document . . . satisfies the requirements of section 1 of this Act [that it was made in regular course of business]." Sections 3 and 4 provide, respectively, for the issuance of a commission to an American consul and for the taking by him of testimony thereunder according to its terms. Under section 5 the consular officer is required, if he is satisfied upon all the testimony taken that the foreign document is genuine, to certify it to be genuine under the seal of his office and to transmit the document together with the record of all testimony taken, as well as the commission executed by him, "to the clerk of the court from which such commission issued, in the manner in which his official dispatches are transmitted to the Government".

Section 6 provides that "A copy of any foreign document of record or on file in a public office of a foreign country, . . . certified by the lawful custodian of such document, shall be admissible in evidence in any court of the United States when authenticated by a certificate of a consular officer of the United States resident in such foreign country, under the seal of his office, certifying that the copy of such foreign document has been certified by the lawful custodian thereof."

Authentica-
tions

The Foreign Service Regulations of the United States, section X-5, note 14, January 1941, provide:

Certificate of authentication. When an officer, other than an officer of the United States, has performed a notarial act for use in the United States or in one of the several States of the United States, and the laws of the jurisdiction concerned require that the official character of the executing officer be authenticated by a diplomatic or consular officer of the United States in order to give the service legal effect and force within the jurisdiction, the diplomatic or consular officer shall issue a certificate of authentication.

In a circular instruction in 1934 the Department of State said:

In view of the mandatory requirements of Section 7 of the Act of April 5, 1906 (34 Stat. 99), and of the provisions of the laws of some of the states, the Department now holds that consular officers should not refuse to authenticate official signatures or seals of foreign notaries public or other officials appearing upon documents intended, generally, for use in the United States.

Signatures
and seals

The Assistant Secretary of State (Carr) to diplomatic and consular officers, June 15, 1934, MS. Department of State, file 122.21/418A.

See also 35 U.S.C. §35 authorizing authentication of signatures of local officials in patent matters, as well as direct notarization by consuls.

Prior to the above circular instruction, consuls were permitted but not required to authenticate official signatures. The practice was based upon a ruling of the Attorney General of the United States of Aug. 1, 1866 (12 Op. Att. Gen. [1866] 1) that a certificate as to the official character of a foreign notary is not a notarial act. See the Chief of the Division of Foreign Service Administration (Hengstler) to W. F. Watson, July 8, 1930, MS. Department of State, file 193.55/573.

In 1931 the Department of State said:

If you have taken appropriate measures to familiarize yourself with the signatures and seals of all notaries public in your consular district, it is not seen why, in order to prevent possible unnecessary delay and charges, you might not authenticate directly the seal or signature, or both, of the notary public before or by whom a document might be executed or an acknowledgment taken, rather than . . . that the seal and signature of such notary be authenticated by various other officials before being presented to you for final authentication, unless this procedure is required by the law of the place where the document is to be used.

The Department of State to Vice Consul Daniels, June 8, 1931, MS. Department of State, file 193.55/590.

In a letter to the Veterans' Bureau, it was explained that "consular officers are authorized to authenticate only original signatures; it is not, therefore, considered expedient to authorize the authentication of facsimiles of signatures on photostat copies". The Assistant Secretary of State (Carr) to the Director of the Veterans' Bureau, Dec. 17, 1928, MS. Department of State, file 193.5/145a.

The Department of State in 1924 approved the action of an American consular officer in Switzerland in authenticating the signature of the French Consul at the same city. The Director of the Consular Service (Carr) to Consul General Murphy, Jan. 9, 1924, MS. Department of State, file 193.55/355.

The Department of State approved the suggestion that American Foreign Service officers be authorized to authenticate the seals of their colleagues stationed in other countries. Assistant Secretary Carr to Consul Knabenshue, Feb. 25, 1927, MS. Department of State, file 193.5/125. See also the Director of the Consular Service (Carr) to Consul Kemper, no. 20, Mar. 26, 1920, *ibid.* 193.55/197; Mr. Carr to Consul Waterman, Feb. 19, 1923, *ibid.* 193.55/321.

The Department has no objection to your certifying to the seal of the Department of State (not the signature of the Secretary of State) if requested to do so.

The Director of the Consular Service (Carr) to Consul General Robertson, no. 165, June 26, 1912, MS. Department of State, file 193.55/76.

The Department of State instructed an American Consul that, while he could not authenticate the signature of the Acting Secretary of Agriculture, he might properly issue a certificate to the effect that the individual in question was Acting Secretary on the date of the document

and that the seal was that of the Department of Agriculture. Secretary Lansing to Consul General Long, Dec. 10, 1919, MS. Department of State, file 193.55/190.

American consular officers are not competent to certify signatures and seals of notaries public in the United States, and the Department is without authority to authorize them to do so.

Acting Secretary Grew to Consul Lakin, telegram of July 6, 1925, MS. Department of State, file 193.55/423. To the same effect, see Assistant Secretary Carr to Consul Caffery, May 15, 1929, *ibid.* 193.55/550.

With reference to the authentication of notarial documents for persons in a foreign city where there was no American consular representation, the Department of State instructed the Minister in Albania:

In view of the hardship which results from the present method of procuring authentications, and the fact that the documents in question are required for use by the Veterans' Bureau, the Department authorizes you and the commissioned personnel of your mission to authenticate the signature and seal of the British Vice Consul at Korcha, when these documents have been sworn to before him. Before executing any authentications under the authorization in this instruction you should procure a genuine specimen signature of the British Vice Consul at Korcha for the purpose of comparisons and official evidence which satisfies you that the person who signs as British Vice Consul is duly recognized by the Albanian Government in that capacity.

This procedure has been authorized to facilitate the work of the Veterans' Bureau and should not be extended to other cases.

Assistant Secretary Carr to Minister Hart, no. 138, Oct. 11, 1927, MS. Department of State, file 103.9992/4364.

In 1917 an American Consul in Costa Rica inquired of the Department of State as to whether he should authenticate the signatures of notaries public and judges on official documents. The Government of Costa Rica was not at that time recognized by the United States. The Consul pointed out that the recent overthrow of the government had not disturbed these officials in their posts. The Department authorized him to continue authentication of notarial certificates.

Officials of
unrecognized
governments

In a similar situation in Cuba in 1933, the Department said:

The Department knows of no reason why you may not authenticate the signatures and seals of officers who under the new regime in Cuba have been continued in office. This procedure is one which is usually followed in countries where changes in governments of the character mentioned by you have occurred, and one which is considered as not involving recognition of the new regime.

Consul Chase to Secretary Lansing, no. 41, Feb. 24, 1917, and Mr. Lansing to Mr. Chase, telegram of Mar. 27, 1917, MS. Department of State, file 193.55/153; Consul General Dumont to Secretary Hull, no. 2153, Sept. 19,

1933, and Under Secretary Phillips to Mr. Dumont, Oct. 2, 1933, *ibid.* 193.55/659.

The Department of State, in Oct. 1924, authorized an American Consul in Chile to authenticate the signatures of officials of the unrecognized military government of Chile, indicating that the officials in question were the *de facto* authorities then functioning in Chile. Consul General Delchman to Secretary Hughes, telegram of Sept. 28, 1924, and Mr. Hughes to Mr. Delchman, Oct. 3, 1924, MS. Department of State, file 193.55/383.

Following a change of government in Costa Rica the American Consul in that country refrained from authenticating the signature of the Secretary of State of the new government, not recognized by the United States. The consul's action was approved. The Director of the Consular Service (Carr) to Consul Chase, no. 21, Mar. 8, 1917, MS. Department of State, file 193.55/149.

The Department of State informed American consular officers in Mexico, in 1920, that they were not to authenticate administrative acts of the appointees of the regime then functioning in Mexico City pending the extension of recognition by the United States to some government in that country. The Department of State to consular officers in Mexico, Oct. 12, 1920, MS. Department of State, file 193.55/206.

**Certificates
as to facts**

If a consular officer should have no official knowledge of the truth of an alleged fact, it is obvious that he should not certify to the correctness of the statement. In appropriate cases, there would be no objection to his certifying to a mere fact of recordation; for instance, he may certify that a person is registered in the consular office as an American citizen, if such is a fact.

The Assistant Secretary of State (Carr) to the Consul at Nagoya (Hawley), Oct. 25, 1924, MS. Department of State, file 193.55/371. See also Mr. Carr to the Consul at Surabaya, Java (Hudson), Apr. 26, 1935, *ibid.* 193.55/721.

The Department of State, having received an inquiry whether an American consular officer might, in authenticating a document, include in his certificate a statement "to the effect that the document is a valid and subsisting document of such country and that the copy is duly certified by the officer having the custody of the original", replied:

"It should be stated that in the authentication of a document a consular officer's duty does not extend to the contents thereof, unless fraud is apparent; nor, since he is not, except in a very general sense, expected to be familiar with the laws of the country wherein he is stationed, is the officer required to determine the legal status thereof nor, generally, whether the document is a matter of record in the issuing office. Ordinarily, it would seem to be proper for consular officers to limit themselves to authenticating only the signature, seal, official character, authority, et cetera, of the foreign official who may have issued or certified a document, and to state that it is certified according to the form in use in the particular foreign country. There would appear to be no valid reason, however, why such officer might not state in his certificate of authentication that the foreign officer who may have certified the document, or before whom it was executed, is the official that he states that he is, or that he has been informed by competent authority that the document is certified by the official authorized by the laws of the country to issue such a certificate.

"If it be necessary, in order to comply with the specific requirements of the law of a particular State or Territory, that a consular officer certify that a certain instrument is recorded in a particular office of record in his consular district, the officer might, in the special circumstances, be specifically authorized by the Department so to do. In that case, the officer is required . . . to collect . . . the prescribed fee . . . for the time he is absent from his consulate, and his actual and necessary expenses in proceeding to the place where the service is to be performed and in returning to his post, should it be necessary that the service be performed elsewhere than at his consulate."

H. T. Sola to Secretary Hull, Oct. 9, 1937, and Assistant Secretary Messersmith to Mr. Sola, Oct. 14, 1937, MS. Department of State, file 193.55/808. See also the Chief of the Division of Foreign Service Administration (Hengstler) to Vincent A. Bracco, Mar. 13, 1929, *ibid.* 193.55/548.

"American diplomatic and consular officers are not regarded as competent to certify that a document is a 'valid and subsisting document' in the countries where such officers are stationed." Such documents should be certified by the competent local officials whose official character may then be certified or whose seal and signature may be authenticated by the appropriate American diplomatic or consular officer. The Chief of the Division of Foreign Service Administration (Hengstler) to F. A. Velarde, Mar. 19, 1928, MS. Department of State, file 193.5/137.

An American Consul cannot authenticate an original death certificate in a foreign country since "an American consular officer could not properly certify to the truthfulness of the statements contained in the document". However, if such a certificate is attested by a competent official in the country of the consul's residence, he may properly certify to that person's official character. The Director of the Consular Service (Carr) to W. A. Dunn, June 15, 1922, MS. Department of State, file 193.5/67.

"Your action in consenting to certify to the correctness of copies of certain Turkish tax receipts was correct, assuming, of course, that, to enable you to do so, the originals thereof were submitted for your inspection, . . .

"Your action in refusing to certify that certain documents purporting to be original Turkish tax receipts are, in fact, Turkish tax receipts also was correct, since an American consular officer is not competent to perform such services.

"Your action in having a member of your staff, notwithstanding his familiarity with both the Turkish and English languages, swear to the correctness of translations of Turkish tax receipts was incorrect. . . . Consular officers are . . . no longer required or expected to [make or certify to the correctness of translations] . . ."

The Assistant Secretary of State (Carr) to the Consul at Constantinople (Allen), June 10, 1930, MS. Department of State, file 193.55/572.

The Department of State in Oct. 1916 instructed an American consular officer that he "should certify to the genuineness of copies of documents and to the correctness of translations, etc., only when such copies are made in the Consulate-General". In 1928 the Department, in view of the special requirements of the New York Civil Practice Act, instructed a consul to authenticate a court judgment by certifying that it was a copy of the judgment on file, providing the Italian authorities interposed no objection to his examination of the official records. The Third Assistant Secretary of State (Phillips) to the Consul General at Vienna (Halstead), no. 375, Oct. 7, 1916, MS. Department of State, file 193.55/136; the Chief of the Division of Foreign

Service Administration (Hengstler) to Messrs. Frank, Weil and Strouse, Nov. 12, 1923, *ibid.* 193.55/523.

"Before the Alien Property Custodian can give consideration to the claim of Messrs. Herrero, Riva and Company, it is necessary that evidence be furnished that the official certifying to the Spanish nationality of the firm is the proper official authorized by the Spanish law to do so, and it is not within the jurisdiction of the American Consul at Bilbao to certify to this fact. In order to avoid the necessity of returning the papers in this case to Spain for proof of this fact, the Alien Property Custodian is willing to accept the certificate of the Spanish Ambassador that the Registrar is the proper official under the Spanish laws to certify to the nationality of a Spanish corporation." Secretary Hughes to the Spanish Ambassador (Riaño y Gayangos), Sept. 9, 1921, MS. Department of State, file 193.5/48.

An American Consul in Finland was told that he could not certify that orders given by a bank in Finland were signed by officers of the bank having authority to act, as he was not in a position to take such responsibility. Consul Haynes to Secretary Lansing, telegram 217, Mar. 30, 1919, and Acting Secretary Phillips to Mr. Haynes, telegram of Apr. 4, 1919, MS. Department of State, file 193.55/179.

"... this Department has always held that the consular officers of the United States are not competent to certify as to the laws of foreign countries generally, and are not required to have official knowledge of the laws of foreign countries except such as may relate to their official duties as defined by the United States statutes."

The Acting Secretary of State (Wilson) to the Governor of Illinois (Deneen), Mar. 6, 1909, MS. Department of State, file 17663. See also Secretary Hull to Governor Lehman, July 13, 1936, *ibid.* 193.55/760; the Assistant Counsel to the Governor (Corcoran) to Mr. Hull, Apr. 15, 1938, *ibid.* 193.55/823; Secretary Bacon to the Governor of New York (Hughes), Feb. 27, 1909, *ibid.* 17510/5A.

"When, and if, an American consular officer is requested to issue a certificate in which it is to be stated that he has personal knowledge of the financial standing or condition of a person or of a concern ... he should, obviously, refuse to issue such a certificate." The Chief of the Consular Bureau (Hengstler) to the Consul at Copenhagen (Letcher), May 10, 1924, MS. Department of State, file 193.55/363.

Contents of documents

... the responsibility of an officer performing such service [acknowledgment of signatures] does not extend to the contents of the document, the consul's certificate merely serving to attest its execution and acknowledgment.

The American Consul at Cartagena (Soule) to the Secretary of State (Hughes), no. 141, Mar. 21, 1922, and the Director of the Consular Service (Carr) to Mr. Soule, May 1, 1922, MS. Department of State, file 811.5123/1764.

The Foreign Service Regulations of the United States, section X-5, note 8, January 1941, provide:

False statements in documents offered for certification.
When officers have satisfactory evidence of the falsity of a material statement in a document which they are required to certify,

they shall include in their certification a statement of their knowledge regarding the matter to which the document relates and shall immediately report to the Department concerning the action taken, including in their report a comprehensive statement of the facts upon which their knowledge concerning the falsity of the affiant's statement is based.

It appearing that the consular agent at Bluefields had refused to attest the signature of a notary public to an affidavit on the ground that an allegation of domicil of a minor child contained in the document was not true, the Department gave the following instruction:

... While Consuls are not required to examine into the validity or purport of the documents or to pass upon any contentious questions involved, it is thought they may properly refuse to legalize a document presented to them when they are satisfied beyond a doubt that the statements contained therein are false and intended to perpetrate fraud. In the case in question, however, the point in contention, namely the domicile of a minor, depends so entirely on the intention of the party that ordinarily it would seem that a consular officer would hardly be competent to determine the question.

The Chief Clerk of the Department of State (Carr) to Consul Ryder, no. 38, Nov. 26, 1907, MS. Department of State, file 9358.

... With regard to the possibility of his being asked to authenticate the signatures of parties to possibly fraudulent arms contracts, you are directed to inform him [the Consul] that, since the law requires consular officers to perform any notarial act which any notary public is authorized or required by law to perform in the United States, it would appear that the Vice Consul could hardly avoid the authentication in question. However, should he have reason to believe that any arms contracts which come to his attention are fraudulent in intent, he should, of course, report the facts to the Department for action by the appropriate authority of this Government.

The Vice Consul at La Paz, Bolivia (Shillock) to the Secretary of State (Hull), no. 57, June 5, 1934, and the Assistant Secretary of State (Welles) to the Minister at La Paz (Des Portes), no. 40, July 6, 1934, MS. Department of State, file 724.3415/3833.

The American Consul in Jerusalem informed the Department of State that it was the practice of certain institutions in soliciting funds for charitable purposes to prepare a document setting forth the object of the solicitation and to request the consul to authenticate the signatures of the officers of the institution or the promoters of the charity. He stated that the effect of this authentication in some cases might be to give the impression that he was officially endorsing the appeal for funds. The Department informed him that the act of 1906 made it imperative that he grant the authentication of the signatures but that there was nothing to prevent him from stating in his certificate his

exact knowledge or relation to the facts or circumstances set forth in the body of the document.

Consul Coffin to the Assistant Secretary of State, no. 118, Nov. 17, 1910, and the Director of the Consular Service (Carr) to Mr. Coffin, no. 127, Mar. 1, 1911, MS. Department of State, file 193.55/10.

Legal effect of documents

In reply to a request from an American company that in view of British belligerent naval activities the American Consul at Trieste be instructed to certify that shipments from that port destined to and paid for by the company were the property of the company, the Department of State in November 1939 said:

... the American Consul cannot undertake to determine who has title to goods or to certify to the alleged fact of ownership by your company. If necessary the Department will authorize the Consul to certify to any facts which are established to his satisfaction by documents placed in his possession but it cannot authorize him to certify to the legal effects of such documents.

The Legal Adviser of the Department of State (Hackworth) to General Refractories Company, Nov. 10, 1939, MS. Department of State, file 300.115(39) General Refractories Co./5.

Refusal to authenticate notarial signatures

In July 1907 the Governor of Colorado informed the Department of State that the Italian Consul at Denver had refused to authenticate the notarial acts of a notary public in that State, pending the receipt of ministerial orders on the subject. The Department replied that "notwithstanding the delicacy of the subject it is deemed appropriate to request the Italian Government to state the reasons on which the action of the Consul was based". The Italian Foreign Ministry maintained that "Consuls are not required to legalize directly the signatures of Notaries Public, it being permissible on the other hand to demand that the signatures of Notaries Public be previously legalized by the American authorities."

The Acting Governor of Colorado (Harker) to the Secretary of State (Root), May 3, 1907, MS. Department of State, file 6376/4; the Acting Secretary of State (Adee) to the Governor of Colorado (Buchtel), July 30, 1907, and Mr. Adee to Ambassador Griscom, no. 68, July 30, 1907, *ibid.* 6376; Mr. Griscom to Mr. Root, no. 315, Mar. 26, 1908, *ibid.* 6376/9; same to same (with enclosure), no. 328, Apr. 2, 1908, *ibid.* 6376/10-11.

With reference to a complaint that a Russian Consul in Chicago had refused to authenticate the signature of a notary public, the Department of State said that "Inasmuch as Russian consular officers in the United States are under no obligation to authenticate signatures of notaries public, the Department would not appear to be in a position to take any action in regard to the matter."

The Second Assistant Secretary of State (Adee) to H. Elenbogen, Nov. 7, 1916, MS. Department of State, file 702.611/67.

ADMINISTRATION OF ESTATES

§443

Consuls are usually charged with certain duties and responsibilities with respect to estates of nationals of their country who die within their consular districts, especially in those cases where the decedents leave no heirs or personal representatives in the foreign country. Such matters are frequently controlled by treaties or conventions. In the absence of such agreements the extent of the consul's jurisdiction in estate cases is governed, on the one hand, by the law of the state in which the property is situated and, on the other hand, by the authority conferred upon the consul by the laws or regulations of his state, the law of the former being controlling. Generally speaking consuls have the right to take such reasonable steps as may be necessary to conserve the assets of estates of their deceased countrymen. They may, by virtue of conventional stipulations or in the exercise of powers conferred upon them by interested parties when recognized by local administrative and judicial authorities, receive for transmission to the beneficiaries in their country distributive shares of such estates.

Section 1709 of the Revised Statutes of the United States (22 U. S. C. §75) contains the following provisions regarding the duties of American consular officers in foreign countries concerning the estates in those countries of deceased American nationals:

It shall be the duty of consuls and vice consuls, where the laws of the country permit:

First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

Second. To inventory the same with the assistance of two merchants of the United States, or, for want of them of any others at their choice.

Third. To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted.

Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

Fifth. To transmit the balance of the estate to the Treasury of the United States, to be holden in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands they shall deliver them up, being paid their fees, and shall cease their proceedings.

In a discussion of the rights and duties of consuls with reference to decedents' estates, the New York Court of Appeals, in a decision in 1914, said:

... What that practice is has been stated in decisions and confirmed in declaratory statutes and regulations. The function of consuls is to preserve derelict estates. When their countrymen die in foreign lands it is their duty to step in and guard the stranded property from waste. This right belongs to them, irrespective of express statute or treaty, by virtue of their office. ... The custody thus acquired is, however, provisional. It yields to the superior right of legally constituted representatives. If there are such representatives, a consul's function is limited to one of co-operation and intervention. If there are no such representatives, it is his duty, so far as he is able, to administer the estate to the extent of gathering it in and transmitting it to the jurisdiction of the domicile. This much he should do, though the title of administrator be withheld from him. If the title were to be given him, its purpose presumably would be rather to authenticate his powers than to enlarge the occasion for their exercise.

The functions thus defined by usage have been confirmed by statute and regulations declaratory of the existing practice.

Matter of D'Adamo, 212 N.Y. 214, 223-224, 106 N.E. 81, 84 (1914). The court quoted section 1709 of the Revised Statutes and section 409 of the Consular Regulations of 1896.

The Danish Minister in Washington inquired whether the United States would be disposed to negotiate a convention by which "the consuls, vice-consuls or consular agents of Denmark in this country would be authorized to represent and protect the interests of Danish heirs and creditors without a special power of attorney in every case of deaths of Danish subjects in the United States, as well as in the cases of Danish heirs to the estate of a person deceased in the United States". The Department of State informed him:

"The Department does not understand whether it is proposed that there be granted to the consular representatives of Denmark in the United States the right of administration upon estates in this country, which would be equivalent to a grant of probate jurisdiction and the assumption by such representatives of extraterritorial rights for these purposes, or whether it is intended to confer upon these consular officers the right to take charge of or represent all Danish interests in the estate of a decedent whether they be claims for or against such estate and whether the decedent be a Danish subject or a person of other nationality.

"In either case, however, it should be said that a treaty would be objectionable. The United States has entered into no treaty with any foreign country granting either of the rights in question, and it considers it undesirable to establish a precedent in this regard."

Secretary Root to Minister Brun, May 2, 1907, MS. Department of State, file 4825; 1907 For. Rel., pt. I, pp. 303-305.

In this connection, the Department begs to call your attention to Section 1709 of the Revised Statutes [22 U.S.C. §75] gov-

erning the duties of American Consular officers under the laws of this country in connection with the settlement of the estates of American citizens dying abroad.

There is no consular convention between this Government and Peru defining the duties of consular officers in connection with the settlement of estates of their deceased nationals. This matter, accordingly, is governed by the local laws in each country. It is possible, therefore, that the local authorities may require that Mr. Johnson's estate in Peru shall be settled through probate proceedings in that country.

The Acting Secretary of State (Lansing) to Senator Martin, Sept. 22, 1914, MS. Department of State, file 323.113/15.

In 1909 the American Consul General in charge at Hong Kong, in reporting the death of an American citizen, informed the Department of State that the public administrator had requested that he assume the duty of administering the estate. Reference was made to article III of the convention as to tenure and disposition of real and personal property concluded between the United States and Great Britain on March 2, 1899 (1 Treaties, etc. [Malloy, 1910] 775), which, after setting forth the duty of the local officials of each country to notify the consular officer of the other of the death, within his district, of fellow nationals of the latter, provides: "The said consular officer shall have the right to appear personally or by delegate in all proceedings on behalf of the absent heirs or creditors, until they are otherwise represented." The Consul General in charge, in his reply to the public administrator, concluded that it would be impossible to administer the estate without first obtaining the permission of the Department of State to apply to the court for letters of administration. The other alternative, he said, was the turning of the entire estate over to him and the waiving of judicial process by the British authorities, in which case he would proceed according to section 1709 of the Revised Statutes (*ante*). The Department approved his action.

Vice Consul General Fuller to the Assistant Secretary of State, no. 356, Apr. 16, 1909, MS. Department of State, file 19781/6; the Chief Clerk of the Department of State (Carr) to Mr. Fuller, no. 181, June 1, 1909, *ibid.* 19781/6-8.

It was suggested to the Department of State in 1921 that, in the interest of uniformity in the certification of wills by American consuls in foreign countries, the regulations of the Department be supplemented by an act of Congress giving proof of a will before a consul the effect of a probate. The Department pointed out that except in extraterritorial countries American consular officers exercise no judicial functions and that the duties of the consuls with respect to the settlement of estates as prescribed by statute were of an administrative rather than of a judicial nature. It was further pointed out that in order to adopt

the suggestion it would be necessary to obtain not only appropriate legislation but also the consent of foreign countries to the exercise by American consuls of probate jurisdiction therein and that there was no reason to expect that such consent would be granted by foreign governments. The Director of the Consular Service (Carr) to Surrogate Judge Cohalan, Apr. 13, 1921, MS. Department of State, file 193.55/219.

"There is no treaty between the United States and Mexico giving consular officers in that Republic authority to take charge of estates of American citizens dying within their districts. If the Court of First Instance at Tuxpam has assumed jurisdiction over the estate in question and has decided to settle it under the Mexican law, you should notify the said court that you hold subject to its order certain effects of the decedent." The Third Assistant Secretary of State (Wilson) to the Consul at Tuxpam, Mexico (Lespinasse), no. 66, Oct. 14, 1907, MS. Department of State, file 7371/13-19.

In reply to a complaint concerning the refusal of the American Consul General at Guayaquil to deliver an estate to the heirs in the United States, the Department of State explained that it had no power to order the Consul General to deliver the estate to anyone. It added that the Consul General was responsible for the proper settlement of estates and that, in order to protect himself, he must require proper proof of a claimant's right to receive an estate.

Secretary Knox to Representative Bartlett, Nov. 9, 1909, MS. Department of State, file 16527/10.

An American Consul in Nicaragua forwarded to the Department of State the personal effects of an American citizen who had died there in October 1906. In informing the Consul that it was not clear whether the property was forwarded for transmission to the father of the deceased, who had furnished proof of his right to the estate, or whether, no claimant having produced evidence of the right to receive the effects and the year prescribed by article XXIII of the Consular Regulations having expired, he was sending it to the Department to be turned into the Treasury, the Department said:

It is not within the province of the Department to settle estates of American citizens dying abroad. All responsibility in such matters must rest with the Consul while the property is in his hands and with the Treasury Department after effects are turned over to it. The estate in question will be forwarded to the Auditor for State and Other Departments and Mr. Frederick Nelson will be informed that he should communicate with that officer furnishing proof of his right to said estate.

The Third Assistant Secretary of State (Wilson) to Consul Timmer, no. 15, Nov. 18, 1907, MS. Department of State, file 6723/2-5.

In response to an inquiry by the American Consul General at Panamá regarding the administration of estates of American citizens

dying while in the employ of the Isthmian Canal Commission or the Panama Railroad Company in the Canal Zone, the Department of State gave the following instruction:

The Department cannot extend your consular jurisdiction to any part of the Canal Zone and in no case should a consular officer undertake the settlement of estates of deceased American citizens dying without his district, in violation of paragraph 30 of the Consular Regulations.

The estates of all American citizens dying within the Republic of Panama outside of the Canal Zone, as defined by the treaty of November 18, 1903, are administered upon by the consular officers in whose district the death occurs, in accordance with article XXIII of the Consular Regulations.

Upon further inquiry by the Consul General, the Department said that—

under the law and regulations consular officers have no authority to take possession of estates of American citizens dying outside of their consular districts except upon a power of attorney from the legal representative. In the hypothetical case submitted by you wherein an American citizen dying in the Canal Zone leaves personal estate in . . . [Panama] you have no jurisdiction over that estate except upon authorization of the legal representatives.

The Third Assistant Secretary of State (Wilson) to Consul General Shanklin, nos. 71 and 75, Apr. 10 and May 13, 1907, MS. Department of State, file 4108/9, /10; 1907 For. Rel., pt. II, p. 937. Paragraph 30 of the Consular Regulations, above referred to, is obsolete. See section VIII-5 of the Foreign Service Regulations of the United States (January 1941).

The American Consul General at Rome requested that the Consul at Milan deliver to him the estate of an American citizen who died in Milan, on the theory that he was domiciled in Rome. In an instruction to the Consul at Milan, the Department of State said that—

"the Consul General at Rome is in error in this matter . . . Under the law and the Consular Regulations, you are the Consular officer charged with the care and protection of estates of American citizens dying within your consular district, and your duties in this regard cannot be suspended by any other consular officer. The Consul General at Rome has not shown that he is directed in any legal testamentary disposition to care for the estate, and he has no rights or duties in the premises whatever as a consular officer." The Chief Clerk of the Department of State (Carr) to Consul Dunning, no. 82, Jan. 2, 1908, MS. Department of State, file 9577/2-16.

In an instruction of September 14, 1907 the Department approved the action of the Consul at Pernambuco in taking charge of the estate of one Mr. Poleni, said to be of German nationality, whose only heir was a native-born American citizen residing in the United States, the German Consul in Pernambuco having denied any knowl-

Nationality
of decedent

edge of the nationality of the deceased. The Department stated that, while consular officers are not authorized to take charge of and settle estates of persons other than American citizens dying within their consular districts, the action of the Consul in this instance appeared proper because of the doubt as to the nationality of the decedent and the fact that his heir was an American citizen.

The Chief Clerk of the Department of State (Carr) to Consul Chamberlain, no. 22, Sept. 14, 1907, MS. Department of State, file 8453.

**Limitations
imposed by
local law**

You are instructed to state to whatever American citizens may be interested in this matter that in the absence of a treaty with Russia American consular officers in that country have only such rights of intervention in the settlement of the estates of deceased Americans as are permitted by Russian law. . . .

It does not seem feasible for the United States to enter into any arrangement or understanding with Russia short of a treaty, inasmuch as the settlement of decedents' estates is in this country under the jurisdiction of the state governments.

The Chargé d'Affaires in Russia (Wilson) to the Secretary of State (Bryan), no. 641, Dec. 9, 1913, and the Counselor of the Department of State (Moore) to Mr. Wilson, no. 259, Jan. 27, 1914, MS. Department of State, file 711.6121/5.

**Foreign consuls
in U.S.**

In reply to an inquiry concerning the right of foreign consuls in the United States to receive legacies for transmission to their non-resident countrymen, the Department of State said:

In the absence of treaty provisions conferring upon consular officers of foreign countries in the United States the right to receive on behalf of their nationals legacies bequeathed to them by citizens of the United States, the rights of these officers in such matters would appear to depend upon the local laws applicable to the subject and upon the laws of the foreign countries defining the duties of their consular officers in the United States.

The Solicitor of the Department of State (Hyde) to Messrs. Jenkins and Barker, Oct. 22, 1923, MS. Department of State, file 711.0021/153.

In reply to a similar inquiry the Department of State said:

This inquiry was referred to the Department of Justice, and a reply has now been received from the Attorney General communicating the following statement:

"The courts of this Country generally recognize the principle that a foreign consul has the right to intervene to preserve the estates of decedents who are nationals of the country which he represents.

"The details of procedure governing the administration of decedents' estates vary in the forty-eight States, as they are to some extent dependent on state statutes. In several States there are express statutory requirements that notice of the appointment of an administrator shall be sent to consular representatives, if

the deceased was an alien, or if the heirs are residents of a foreign country. In many States it is within the discretion of the court having charge of the administration of decedents' estates to appoint a foreign consul as administrator."

The Counselor of the Department of State (Moore) to the Chargé d'Affaires ad interim in Iran (Engert), no. 334, Oct. 20, 1937, MS. Department of State, file 711.9121/6.

The Supreme Court of Michigan, after deciding that a Russian Consul did not himself have the right to be appointed as administrator of the estate of a deceased fellow national, held that by virtue of his duties to conserve the estate and to protect the interests of the heirs, who were also fellow nationals, he had the right to institute proceedings for the appointment of an administrator.

Appointment
of admin-
istrator

Paperno v. Michigan Railway Engineering Co., 202 Mich. 257, 168 N.W. 508 (1918).

The Supreme Court of Alabama, in considering the petition of an Italian consular officer for the removal of the administrator of the estate of an Italian subject whose heirs were residents and subjects of Italy, said:

Removal of
admin-
istrator

The duty, and by comity the authority, of a consul to receive and care for the personal estate of citizens of his own country who may die within his consulate, and to protect the estate from spoliation, is prescribed and recognized by all civilized nations. 5 Moore's Digest International Law, §722, p. 117; The Bello Corrunes, 6 Wheat. 152, 5 L. Ed. 229; Wheat. Int. Law (2d Ed.) 151; Woolsey's Int. Law, §96. Of the general propriety of such a practice there can be no possible doubt, and we are of the opinion that the appellant's intervention on the grounds set forth in his petition was no more than his official duty prescribed, and was authorized by the law and comity of nations.

We mean to say only that he had a right to be heard on his petition, independently of treaty provisions, for the purpose of procuring the removal of these administrators if shown to be dishonestly conspiring to despoil the estate, or if they were improvidently appointed; and that this prerogative attaches by law to his consular office, without any special authority from those who are entitled to the estate.

Carpigiani v. Hall et al., 172 Ala. 287, 291-292, 55 So. 248, 250 (1911).

A German Consul in Minnesota objected to the admission to probate of a decedent's will on grounds of his information and belief that decedent left surviving next of kin and heirs at law who were residents and nationals of Germany. A certified copy of the Probate Court's order admitting the will to probate was subsequently served upon the Consul's attorney. The heirs at law and next of kin served a notice of appeal to the District Court from the order of the Probate Court

Not personal
representa-
tive of heirs

admitting the will to probate. The District Court dismissed the appeal on the ground that under Minnesota law it should have been taken not more than 30 days after service of a copy of the order appealed from on the party taking the appeal, while in this case the appeal was taken more than 30 days after the service of the copy on the Consul. The decision was reversed by the Supreme Court of Minnesota which held that service on the Consul was not effective to limit the time for taking appeal, in as much as service on the Consul could not be considered as service on the appellants. The court said:

A consul may doubtless take appropriate measures for the protection of the property interests of the citizens of the country which he represents in cases where they have no other representative and are not present to act for themselves. But he acts merely in his official capacity as the representative of his government, and not as the personal agent or representative of the parties in interest, unless he has been given special authority to act for and represent them. See 9 R.C.L. 157; 2 C.J. 1307; *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N.W. 300; *Hamilton v. Erie Ry. Co.*, 219 N.Y. 343, 114 N.E. 399, Ann. Cas. 1918A, 928; *Ljubich v. Western Cooperage Co.*, 98 Or. 633, 184 Pac. 551; *Chryssikos v. Demarco*, 134 Md. 533, 107 Atl. 358. His acts are provisional and for the purpose of preserving the property and securing for his nationals an opportunity to assert and maintain their rights thereto.

Consular officers are frequently given special rights and powers by statute or treaty, but there is no claim that any statute or treaty gave the German consul any special right or power to act in the present instance. We have been cited to no case, and we have found none, holding that a consul, simply by virtue of his office, has power to act for and represent individual claimants to property, so as to foreclose their claims thereto, without special authority to do so. Unless specifically authorized to represent claimants by statute, treaty or the claimants themselves, he is not the personal agent of the individual claimants, and service of process or other papers upon him does not operate as service upon them. It follows that service of the order upon Heim did not operate to limit the time within which the appellants could take an appeal, and that the court erred in dismissing the appeal.

In re John Herrman's Estate, Appeal of Gauer et al., 159 Minn. 274, 276-277, 198 N.W. 1001, 1002 (1924).

Under article 15 of the consular convention of 1881 between the United States and Rumania (2 Treaties, etc. [Malloy, 1910] 1509) providing that consular officers "shall have the right to appear, personally or by delegate, in all proceedings on behalf of the absent or minor heirs or creditors, until they are duly represented", a New York Surrogate's Court held in 1931 that the consul's appearance was superseded by the legatee's subsequent personal appearance or its equivalent (appearance by attorney in fact). *In re Reiss' Estate, In re Margulies*, 138 Misc. 845 (Surr. Ct., King's Cy.), 248 N.Y. Supp. 169 (1931).

It was held that a minor heir was "duly represented" under the above provision by a special guardian who took precedence over the consul. *In re Gruner's Estate*, 149 Misc. 341 (Surr. Ct., Bronx Cy.), 267 N.Y. Supp. 388 (1933).

Matter of the Estate of Sarah Katz, 152 Misc. 757 (Surr. Ct., King's Cy.), 274 N.Y. Supp. 202 (1934), upheld the right of Polish Consuls to represent their non-resident fellow nationals in probate matters under a treaty between the United States and Poland authorizing consuls of either party to appear in probate matters "unless such heirs or legatees themselves have appeared either in person or by duly authorized representatives". See 4 Treaties, etc. (Trenwith, 1938) 4583.

However, it was held in *In re Kolodziej's Estate*, 153 Misc. 115 (Surr. Ct., N.Y. Cy.), 274 N.Y. Supp. 486 (1934), that under the treaty above referred to and by virtue of New York law a Polish Consul was entitled to appear only after citation had been issued to the heirs and legatees and they had failed to appear.

The following cases decided by New York Surrogate's Courts deny the right of foreign consuls to appear in probate proceedings and waive the citation of minor non-resident heirs of their nationality: *In re Peterson's Will*, 51 Misc. 367 (Surr. Ct., Queen's Cy.), 101 N.Y. Supp. 285 (1906); *In re Nyahay*, 66 Misc. 418 (Surr. Ct., Westchester Cy.), 121 N.Y. Supp. 207 (1909); *In re Clark's Estate*, 152 Misc. 723 (Surr. Ct., N. Y. Cy.), 274 N.Y. Supp. 282 (1934); *In re Hansen's Estate*, 155 Misc. 712 (Surr. Ct., Monroe Cy.), 281 N.Y. Supp. 617 (1935). See also *In re Bristow*, 63 Misc. 637 (Surr. Ct., King's Cy.), 118 N.Y. Supp. 686 (1909).

By virtue of the most-favored-nation clause in article VIII of the convention of friendship, commerce, and navigation of 1826 between the United States and Denmark (1 Treaties, etc. [Malloy, 1910] 375), the Danish Consul in San Francisco claimed to be entitled to receive from the executor of an estate in probate the distributive shares of heirs who were nationals and residents of Denmark. The Consul invoked, under this clause, article 25 of the treaty of friendship, commerce, and consular rights signed in 1923 between the United States and Germany (4 Treaties, etc. [Trenwith, 1938] 4201), providing for the exercise by consuls of the respective countries of functions of the character of those claimed by the Danish Consul. The Supreme Court of California denied the Consul's contention, holding that the Danish convention related entirely and exclusively to navigation and commerce, that it was entered into a century before the German treaty, that it was manifestly not intended to grant privileges not then extended to other powers, and that it contained no clause (found in some later treaties) providing that future privileges and immunities accorded consuls of the most-favored-nation should inure to the consuls of the parties to the convention. The court pointed out further that "The right asserted by appellant was not a mere right, privilege, or immunity ordinarily accorded to consular or other representatives of a foreign power which may be said

Distributive
shares

to naturally come within the purview of the comity of nations", and that a court would not be warranted in altering established international practice unless the governments involved had by treaty clearly evidenced their intention of so doing.

In re Clausen's Estate, 202 Calif. 267, 271, 259 Pac. 1094, 1095 (1927).

In a later case the consul, having received a power of attorney from heirs in Denmark, appointed thereunder an attorney to represent them in probate proceedings. The attorney, who was subsequently sued by the heirs, sought to set off sums allegedly due him from the Danish Government and from Danish heirs whom he represented, and he also alleged the "sovereign immunity" of his employer, the consul. The California District Court of Appeal for the First District referred to the above case as follows:

"The recent case of *Estate of Clausen*, 202 Cal. 267, decides that the consul of Denmark, in representing foreign heirs, does not do so in his sovereign capacity under and by virtue of the treaty between the United States and Denmark establishing consular offices and defining their duties. Danish Treaty, August 10, 1826, 8 Stat. U.S. 340. The Danish consul, therefore, in acting for foreign heirs, does so under a power of attorney and not in his official capacity. *In re Estate of Servas*, 169 Cal. 240, 146 P. 651, Ann. Cas. 1916D, 233; *In re Estate of Ghio*, 157 Cal. 552, 108 P. 516, 37 L. R. A. (N. S.) 549, 137 Am. St. Rep. 145. We must conclude, therefore, that the kingdom of Denmark in no way is interested in this action in its sovereign capacity."

The Circuit Court of Appeals for the Ninth Circuit concurred in this view in subsequent proceedings in bankruptcy relating to the same matter. *Petersen et al. v. Lyders*, 139 Calif. App. 303, 304-305, 33 P. (2d) 1030, 1031 (1934); application to review denied by the Supreme Court of California, *Petersen et al. v. Lyders*, 139 Calif. App. 307, 33 P. (2d) 1032 (1934); writ of certiorari denied by the Supreme Court of the United States, *Lyders v. Petersen*, 294 U. S. 716 (1935); petition for rehearing denied, *ibid.* 734; *Lyders v. Petersen et al.*, 88 F. (2d) 9 (C. C. A. 9th, 1937).

By virtue
of treaty

In 1917 the Swedish Consul General filed a petition in probate proceedings that the distributive share of decedent's father, a subject and resident of Hungary, should be paid to him as he had assumed charge of Austro-Hungarian interests at the port of New York. The court stated that the Deputy Attorney General of the State of New York had inquired of the Department of State as to the right of the Swedish Consul General to receive money in behalf of subjects of the Kingdom of Hungary in view of the severance of diplomatic relations between Austria-Hungary and the United States, and that he had been informed that as a state of war did not exist between the United States and Austria-Hungary the question of the right of the Swedish Consul General would seem to depend upon the laws of the State of New York, the laws of Austria-Hungary, and possibly the laws of Sweden, relating to the rights and duties of their consular officers. The court held that as the Austro-Hungarian

Consul General would have been entitled by treaty to receive the money and as the Swedish Consul General had taken charge of Austro-Hungarian interests in the United States pursuant to an arrangement with that Government and with the consent and approval of the Government of the United States, the petition of the Swedish Consul General should be granted.

In re White, Public Administrator of Queen's County, 100 Misc. 393 (Surr. Ct., Queen's Cy.), 166 N.Y. Supp. 712 (1917). See *In re Nagy's Estate*, 143 N.Y. Supp. 848 (Surr. Ct., N.Y. Cy., 1909).

Article XXV of the treaty of friendship, commerce, and consular rights signed by the United States and Germany in 1923 reads:

A consular officer of either High Contracting Party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in process of probate or accruing under the provisions of so-called Workmen's Compensation Laws or other like statutes provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission.

4 Treaties, etc. (Trenwith, 1938) 4191, 4201.

At the request of an American citizen who desired to know whether Swiss Consuls in the United States could legally receive and receipt for legacies on behalf of Swiss heirs, the Department of State, in 1931, instructed the Minister in Bern to inquire whether, under a most-favored-nation clause and the above provision in the treaty between the United States and Germany, the Swiss Government would accord American Consuls in Switzerland reciprocal rights. The Swiss Government said:

. . . Swiss law, by leaving to the state appointing them the task of regulating their duties in this field, in no way forbids foreign consuls from acting in behalf of their citizens and proceeding to the distribution of funds referred to in Article 25 of the German-American treaty of Friendship, Commerce and Consular Rights of December 8, 1923.

Under the law at present in force consuls of the United States, as well as consuls of other countries, or all other agents, are merely called upon to prove in each individual case that the persons in whose name they are acting are legally entitled to receive the funds which they undertake to distribute, and that they themselves have the right to give receipts.

With reference to the last-quoted paragraph the Department said:

The latter statements cause some doubt as to whether the Swiss Government considers that American Consular officers in Switzerland would have an unqualified right to receive funds

from estates probated in that country for transmission to non-resident American beneficiaries in the manner provided for in Article 25 of the treaty between the United States and Germany of 1923.

While the Department cannot undertake to say how the courts of this country would construe the provisions of Article 25 of the treaty between the United States and Germany of 1923 it would seem that the court probating the estate in the country in which the consular officer is stationed, would upon all the evidence before it determine who are legally entitled to the proceeds of the estate. While it is assumed that the court would receive and consider evidence from the consular officer on this point, the Department does not consider that the burden of showing who are entitled to receive the proceeds of the estate rests upon him, as might be inferred from the Swiss note.

The Department interprets Article 25 of the treaty with Germany of 1923 to mean that a consular officer is made eligible so far as concerns the country of his residence to receive funds for transmission as provided for therein, but that whether he may act in this capacity depends upon whether he is authorized to do so by his own Government. The Department does not contemplate authorizing American consular officers in Switzerland to receive for transmission funds from estates probated in that country, but merely desires to determine whether the Swiss authorities would, if called upon to do so, grant to American consular officers in Switzerland the right, as provided in Article 25 of the treaty with Germany, that might be claimed for them to receive funds for transmission if they be authorized by their Government to receive such funds.

The Swiss reply, transmitted to the Department by the Legation on October 6, 1931, was confined, on this point, to the reiteration of the first of the above-quoted paragraphs of its earlier statement and a request that the appropriate American authorities be notified of the corresponding rights of Swiss Consuls.

The Assistant Secretary of State (Castle) to the Minister in Switzerland (Wilson), no. 673, Oct. 25, 1929, MS. Department of State, file 711.5421/15; the Chargé d'Affaires ad interim in Switzerland (Moffat) to the Secretary of State (Stimson) (with enclosures), no. 1337, Mar. 5, 1930, and Mr. Castle to Mr. Wilson, no. 1239, Jan. 15, 1931, *ibid.* 711.5421/17; the Chargé d'Affaires ad interim (Greene) to Mr. Stimson (with enclosures), no. 2270, Oct. 6, 1931, *ibid.* 711.5421/25.

In 1931 the public administrator of Michigan informed the Department of State that a Greek Consul had claimed to be entitled to receive and receipt for the distributive shares of the estate of a deceased national of Greece in Michigan on behalf of heirs who were residents and nationals of Greece. The public administrator inquired whether applicable treaty provisions granted the Consul rights at variance with the established practice of his office of requiring specific powers of attorney before turning over such funds. It ap-

peared that the Consul had powers of attorney executed by three of the five heirs of the decedent in Greece. The Department said that by virtue of a most-favored-nation provision in a consular convention between the United States and Greece, and in view of reciprocal privileges accorded in Greece to American consular officers, Greek consular officers in the United States were believed to be entitled to the benefits of article XXV of the treaty of 1923 between the United States and Germany (*ante*). It was added:

The Department is not aware of any judicial interpretation of the provision of the treaty with Germany in relation to the question of the requirement of a power of attorney, and in the absence of such an interpretation or of a case requiring its official action, the Department refrains from expressing a definite opinion on the question. However, in view of the circumstances in which your request for its opinion was made, the Department ventures to suggest for your consideration that if the distributive shares in question were derived from an estate "in process of probate" and if there is no question as to the identity of the heirs or of their right to receive their respective shares and no known objection by any heir to the proposed action of the Consul, the treaty provision under reference might reasonably be interpreted as dispensing with the necessity for the production by the Consul of powers of attorney.

The Michigan State Public Administrator (Wilson) to the Secretary of State (Stimson), Dec. 29, 1931, MS. Department of State, file 311.683 Pharlis, Constantine/1; the Assistant Secretary of State (Rogers) to Mr. Wilson, Jan. 20, 1932, *ibid.* 311.683 Pharlis, Constantine/3.

The right of foreign consular officers in the United States to be appointed administrators of the estates of their deceased fellow nationals is generally a matter pertaining to the local laws of the several States. In a number of cases, however, such officers have, by virtue of treaty provisions, claimed a right to be so appointed exclusive of or prior to the rights of those who would otherwise be entitled under the State law. This claim has been based chiefly upon article IX of the treaty of friendship, commerce, and navigation of July 27, 1853 between the United States and Argentina (1 Treaties, etc. [Malloy, 1910] 23) and article XIV of the consular convention of June 1, 1910 between the United States and Sweden (3 Treaties, etc. [Redmond, 1923] 2851), which have been invoked by nations parties to treaties with the United States conferring upon their consular officers the rights enjoyed by consuls of the most-favored nation.

Appointment
as adminis-
trator

The Argentine treaty provides that if a citizen of one of the parties dies intestate in the territory of the other, the appropriate consular officer of his nationality "shall have the right to intervene in the possession, administration and judicial liquidation of the estate

Treaty with
Argentina,
1853

of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs". A number of cases decided prior to 1912 held that consuls enjoying most-favored-nation treatment had an exclusive or prior right, under the article, to appointment as administrators. See *In re Fattosini*, 33 Misc. 18 (Surr. Ct., Westchester Cy.), 67 N.Y. Supp. 1119 (1900); *In re Lobrasciano*, 38 Misc. 415 (Surr. Ct., Westchester Cy.), 77 N.Y. Supp. 1040 (1902); *Wyman, Petitioner*; *McEvoy v. Wyman*, 191 Mass. 276, 77 N.E. 379 (1906); *In re Scutella's Estate*, 145 App. Div. (4th Dept.) 156, 129 N.Y. Supp. 20 (1911); *Carpigiani v. Hall et al.*, 172 Ala. 287, 55 So. 248 (1911). *Contra*: *In re Logiorato*, 34 Misc. 31 (Surr. Ct., N.Y. Cy.), 69 N.Y. Supp. 507 (1901).

In 1910 the Supreme Court of California, in deciding the question whether the Italian Consul General or the public administrator should be appointed administrator of the estate of an Italian subject, gave priority to the public administrator and interpreted the above treaty provision as follows:

... The object and purpose of the treaty would be fully met by allowing the foreign consul to represent the citizens of his country who are interested as heirs or creditors in case they are not present or otherwise represented, giving him the right to appear in court for them, either officially, or in their name, to protect their interests, and requiring that he be served with notices to them, when notice is required. The use of the word "intervene" implies an intention to give a right to the consul to appear as a party in a pending administration or action carried on by another person, and not a right to institute and carry on the proceeding himself. He has, in addition, a duty pertaining to his office imposed upon him by his own government, that of seeing to the safe keeping and proper disposition of the effects of citizens of his country who may die while traveling, or while temporarily present in the country to which he is accredited, or even while residing therein, and for that purpose, in the absence of any other representative of the deceased having a better right, he may "intervene in the possession" of the estate, conformably with the laws of the country. The custom of nations would permit this and it may be that, if the public administrator refuses or fails to apply, the consul may petition for and receive letters to himself as the official agent for the persons interested. But the treaty is not to be understood as giving him such right in preference to those upon whom it is devolved by the laws of the country when they are present and ready to accept its possession and discharge their duty concerning it. The theory of respondent is, in our opinion, in harmony with the spirit and purpose of the treaty and is in accord with the obvious meaning of the language used.

In re Ghio's Estate, Rocca v. Thompson, 157 Calif. 552, 561-562, 108 Pac. 516, 525 (1910).

Upon appeal to the Supreme Court of the United States, the decision was affirmed. The court concluded that "there was no purpose in the Argentine treaty to take away from the States the right of local administration provided by their laws, upon the estates of deceased citizens of a foreign country, and to commit the same to the consuls of such foreign nation, to the exclusion of those entitled to administer as provided by the local laws of the State within which such foreigner resides and leaves property at the time of decease".

Rocca v. Thompson, 223 U.S. 317, 334 (1912).

The consular convention of June 1, 1910 between the United States and Sweden provides in article XIV that, in event of the death intestate of a citizen of either country in the territory of the other, the appropriate consular officer of his nationality "shall, so far as the laws of each country will permit, and pending the appointment of an administrator . . . take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate". The convention, which came into force in the interval between the decisions of the Supreme Court of California and the Supreme Court of the United States in *Rocca v. Thompson* (*ante*), was referred to *obiter* by the United States Supreme Court in the latter decision in a manner to indicate that the court considered it an example of an agreement wherein the purpose was declared in "unmistakable terms" to commit the administration of such estates exclusively to the consul. 223 U.S. 332 (1912). Although this dictum was followed in a series of cases in the courts of New York in 1912 and 1913 (*In re Baglieri's Estate*, 137 N.Y. Supp. 175 [Surr. Ct., N.Y. Cy., 1912]; *In re Lombardi*, 78 Misc. 689 [Surr. Ct., Schenectady Cy.], 138 N.Y. Supp. 1007 [1912]; *In re Riccardo*, 79 Misc. 371 [Surr. Ct., Herkimer Cy.], 140 N.Y. Supp. 606 [1913]; *In re Madaloni's Estate*, 79 Misc. 653 [Surr. Ct., Erie Cy.], 141 N.Y. Supp. 323 [1913]; *In re D'Adamo's Estate*, 159 App. Div. [4th Dept.] 40, 144 N.Y. Supp. 429 [1913]), it has been uniformly rejected whenever considered by a court of last resort.

Convention:
Sweden,
1910

In the case of the *Austro-Hungarian Consul v. G. A. Westphal*, 120 Minn. 122, 139 N.W. 300 (1912), involving a contest between the Consul and the nominee of a creditor of the estate, the court interpreted the State law, which provided for the appointment of a consul in such a case prior to the right of a creditor but set a time-limit for making application, which, in the instant case, the Consul had not fulfilled. A question arose whether the Consul had a prior right to appointment by virtue of the above provision of the convention with Sweden which he invoked under a most-favored-

nation clause in a treaty between Austria-Hungary and the United States. The court held that the phrase (in the convention with Sweden) "so far as the laws of each country will permit" qualified the "right to be appointed administrator" as well as the right to "take charge of the property" and accordingly "under the decision in the Rocca Case, and also upon independent reasoning, the state laws will control, though they limit the right of the consul both in point of time within which he must assert his treaty right and in the matter of residence in the state". 120 Minn. 140.

In 1914 the Court of Appeals of New York, in the case of *Matter of D'Adamo*, 212 N.Y. 214, 106 N.E. 81 (1914), adopted the same interpretation of the convention. The court, speaking through Judge Cardozo, said:

... Full effect is given to the language of the treaty if we construe it as adding the foreign consuls to the list of those eligible as administrators so as to enable them to administer upon the estates of their fellow-citizens when no one having a prior right under the local law is competent or willing to act.

This construction is confirmed when we consider that it harmonizes the function of consuls under the treaty with the function of consuls under established international practice. [212 N.Y. 223.]

After discussing these functions the court continued:

The convention with Sweden was intended to confirm the powers thus established by international comity, and to facilitate their exercise. Consuls are to have the right, where the estate is in peril, to intervene at once, and if other representatives are lacking, they are, moreover, to have the right to be appointed administrators themselves. They are to have this right, not to displace others competent under local law, but the better to fulfill their inherent function as provisional conservators. If there is no qualified relative within the jurisdiction and no one else to whom our law gives the right of administration, the consular representative under this treaty may come forward and demand the grant of letters.

212 N.Y. 225 (1914). To the same effect, see: *In the Matter of the Estate of John Servas, Fontana, Consul of Greece v. Hynes, Public Administrator*, 169 Calif. 240, 146 Pac. 651 (1915); *Pagano, Admr. v. Cerri, Italian Consular Agent*, 93 Ohio St. 345, 112 N.E. 1037 (1916); *George J. Chryssikos v. Vincent J. Demarco, etc.*, 134 Md. 533, 107 Atl. 358 (1919); *In the Matter of the Estate of Miltiadis Chaoussis, C. D. Liliopoulos, Consul of Greece v. Albert Grunbaum et al.*, 139 Wash. 479, 247 Pac. 732 (1928); *Lely, Acting Consul v. Kalinoglu*, 76 F. (2d) 983 (D.C. App., 1935); *In re D'Agostino*, 88 Misc. 371 (Surr. Ct., Bronx Cy.), 151 N.Y. Supp. 957 (1914); *In re Comparotto*, 88 Misc. 369 (Surr. Ct., Bronx Cy.), 151 N.Y. Supp. 961 (1914).

In *In re Holmberg's Estate*, 193 Fed. 260 (N.D. Calif., 1912), it was decided that as a Swedish consular officer had the right under the above con-

vention to be appointed administrator of the estate of a deceased Swedish subject, he was entitled, under section 4544 of the Revised Statutes, to receive the estate of a Swedish subject who, at the time of his death, was an American seaman.

The following cases determined, in varying circumstances and with reference to varying State statutes, the relative rights of consular officers to appointment as administrators as against opposing claims: *In re Estate of Wicco Sinovic*, 80 N.J. Eq. 260, 86 Atl. 917 (1912); *In re Infelise's Estate*, *Melzner v. Trucano*, 51 Mont. 18, 149 Pac. 365 (1915); *Diamantopoulos v. Glickas*, 11 F. (2d) 200 (D.C. App., 1926); *In re Fuch's Estate*, 126 Misc. 90 (Surr. Ct., N.Y. Cy.), 213 N.Y. Supp. 431 (1925); *In re Fiumara's Estate*, 127 Misc. 794 (Surr. Ct., N.Y. Cy.), 217 N.Y. Supp. 698 (1925); *In re Pandolfo's Estate*, 123 Misc. 582 (Surr. Ct., Onelda Cy.), 233 N.Y. Supp. 317 (1929); *In re Fabio's Estate*, 134 Misc. 158 (Surr. Ct., Saratoga Cy.), 235 N.Y. Supp. 703 (1929); *In re Conde's Estate*, 144 Misc. 357 (Surr. Ct., Columbia Cy.), 259 N.Y. Supp. 129 (1932).

The Supreme Court of Iowa decided in 1915 that the existence of treaty provisions, by virtue of which a foreign consular officer had been appointed administrator of an estate, would furnish no bar to proceedings, conforming to State law, looking to his removal as administrator. *In re Estate of Bagnola, A. Conte v. Urbano Di Corpo*, 178 Iowa 757, 154 N.W. 461 (1915).

A Swiss consular officer in Colorado, in 1928, claimed the right to be appointed administrator c.t.a. of the estate of a Swiss national, invoking the above convention with Sweden and a most-favored-nation clause in a treaty with Switzerland. The application was denied, and the judgment was affirmed by the Supreme Court of Colorado, which pointed out that the convention with Sweden applied only in case the subject died "without will or testament" while in this case the decedent had left a will, though no executor was named. *Estate of Bourquin, Weiss v. Salvation Army*, 84 Colo. 275, 269 Pac. 908 (1928).

"... Passing other questions, it is clear that the appellant is not entitled to be appointed administrator in his capacity as such consul [of Sweden], unless the decedent was a citizen of Sweden." *In re Person's Estate, Wallerstedt, Consul v. Trank*, 146 Minn. 230, 232, 178 N.W. 738, 739 (1920). To the same effect, where decedent possessed both American and Italian nationality, see *In re Di Roberto's Estate*, 153 Misc. 223 (Surr. Ct., St. Lawrence Cy.), 275 N. Y. Supp. 443 (1934), and cases therein referred to; and see also *Oken v. Johnson*, 160 Minn. 217, 199 N.W. 910 (1924); and *In re Tripodi's Estate, Petition of Roberti, Vice Consul*, 137 Misc. 738 (Surr. Ct., Westchester Cy.), 245 N. Y. Supp. 85 (1930).

In reply to an inquiry concerning the right of an Italian consular officer to be appointed administrator of the estate of a naturalized American citizen on the ground that decedent, under Italian law, was still an Italian national, the Department of State, after referring to the most-favored-nation clause in the appropriate Italian treaty, and to other treaties governing the right of consuls to administer estates, said:

"If, as stated in your letter, the decedent was a naturalized American citizen, the treaty provisions which accord rights to the foreign consular officer to take possession of property of a decedent or qualify as administrator would not appear to be applicable." The Chief of the Treaty Division (Barnes) to Harry A. Goldstein, Feb. 6, 1933, MS. Department of State, file 711.6521/203.

Question
of domicile

A contest arose in the courts of the State of New York in 1929 between the public administrator and the Italian Consul as to which should receive the proceeds of the estate of an Italian subject who died in the United States leaving no heirs. By virtue of a most-favored-nation clause in a treaty between the United States and Italy, the Italian Consul invoked article VI of the treaty of friendship and commerce of December 13, 1856 between the United States and Persia (2 Treaties, etc. [Malloy, 1910] 1373) which provided that in the event of the death of a national of either party within the territory of the other, "leaving no relations or partners in business", his estate was to be delivered to the consul or agent of the nation of which he was a subject or citizen, to be disposed of in accordance with the laws of his country. The New York Surrogate's Court held that in as much as the deceased was domiciled in New York the disposition of his estate was governed exclusively by the law of that State and that the public administrator was entitled to receive the proceeds of the estate. The decision was affirmed by the Appellate Division of the Supreme Court of the State. On appeal to the Supreme Court of the United States the decision was reversed. The latter Court said that the only question was one of escheat—whether the net assets should go to Italy or to the State of New York. It pointed out that the treaty in question did not contain such a clause as "conformably with the laws of the country" or "so far as the laws of each country will permit", as was the case in article IX of the treaty between the United States and Argentina of July 27, 1853 (1 Treaties, etc. [Malloy, 1910] 23) and article XIV of the consular convention of June 1, 1910 between the United States and Sweden (3 Treaties, etc. [Redmond, 1923] 2851), and stated that the omission of such a clause from the treaty with Persia must be regarded as deliberate. The court also said:

. . . In the circumstances shown, it is plain that effect must be given to the requirement that the property of the decedent "shall be delivered up to the consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country," unless a different rule is to apply simply because the decedent was domiciled in the United States.

The language of the provision suggests no such distinction and, if it is to be maintained, it must be the result of construction based upon the supposed intention of the parties to establish an exception of which their words give no hint. In order to determine whether such a construction is admissible, regard should be had to the purpose of the Treaty and to the context of the provision in question. The Treaty belongs to a class of commercial treaties the chief purpose of which is to promote intercourse, which is facilitated by residence. Those citizens

or subjects of one party who are permitted under the Treaty to reside in the territory of the other party are to enjoy, while they are such residents, certain stipulated rights and privileges. Whether there is domiciliary intent, or domicile is acquired in fact, is not made the test of the enjoyment of these rights and privileges. The words "citizens" and "subjects" are used in several articles of the Treaty with Persia and in no instance are they qualified by a distinction between residence and domicile.

It was held that the estate should be turned over to the Italian Consul and that, in as much as the Persian treaty was in force at the time of decedent's death, the fact that it had been subsequently terminated did not affect the case. As to whether the most-favored-nation clause in the Italian treaty should be considered as conditioned on reciprocity, see *ante*, pp. 705-706.

Santovincenzo, Consul of the Kingdom of Italy at New York v. Egan, Public Administrator, et al., 284 U.S. 30, 37-38, 39 (1931), reversing *In re Comincio's Estate*, 135 Misc. 733 (Surr. Ct., N.Y. Cy.), 240 N.Y. Supp. 691 (1929), and *In the Matter of Antonio Comincio, Deceased*, 229 App. Div. (1st Dept.) 862, 243 N.Y. Supp. 814 (1930). To the same effect, see *In re Anderson's Estate, In re Kelly*, 154 Misc. 132 (Surr. Ct., King's Cy.), 276 N.Y. Supp. 966 (1935); *Lanza v. United States*, 22 F. Supp. 716 (N.D. Ohio, 1938).

In 1927 the Department of State upheld the right of the Persian Consul at San Francisco to receive the funds of a Persian national who died without heirs or partners in the United States. The Department said that the Consul should be permitted to receive the funds without the necessity of procuring a power of attorney from the heirs in Persia or instituting the judicial proceeding ordinarily required by the California law. The matter was settled by the execution by the Persian Ambassador of a certificate relieving the California authorities of further liability in the matter. The Secretary of State (Kellogg) to the Governor of California (Young), Jan. 31 and Aug. 9, 1927; Mr. Young to Mr. Kellogg, Sept. 16, 1927; the Assistant Secretary of State (Castle) to the Persian Minister (Meftah), Oct. 5, 1927, and Mr. Meftah to Mr. Kellogg, Nov. 1, 1927: MS. Department of State, file 311.913 Bozorg, Mirza Agha.

ABSTENTION FROM POLITICS

§444

In instructing the Vice Consul General in the city of Guatemala to refrain from expressing an opinion in support of any political faction, the Department of State said: American consuls

In view of the disturbances in the Republic of Guatemala the utmost discretion should be shown in expressing an opinion in support of any political faction and you will refuse hereafter to undertake to forward any letters from persons in Guatemala

complaining of the treatment of foreigners other than those of the country or countries which you represent.

The Chief Clerk of the Department of State (Carr) to the Vice Consul General (Owen), no. 88, May 27, 1908, MS. Department of State, file 13871/1.

In an instruction of February 20, 1930 to the Ambassador in France, the Department of State said that—

it is inadvisable for an officer, or any member of his family, to be affiliated with an organization that is taking any part in the political activities of the country to which he is assigned. While there is no objection to an officer or members of his family being members of clubs or organizations established solely for social, recreational, or charitable purposes, the Department believes it is preferable that they should not act as officers of such clubs or organizations.

Assistant Secretary Carr to Ambassador Edge, no. 70, MS. Department of State, file 120.39/70.

Foreign
consuls
in U.S.

The Department of State, in February 1935, informed the Italian Ambassador in the United States that it had received apparently authentic reports to the effect that certain Italian consular officers in the United States were engaging in the dissemination of Fascist propaganda. The activities of one consul were said to have aroused resentment so wide-spread that "it would appear that he is no longer in a position to perform effectively his proper functions as a Consul", and it was informally suggested that he be transferred to some other country. The Italian Ambassador shortly thereafter informed the Department that steps looking to the transfer of the officer had been undertaken even before the receipt of the Department's suggestion.

In addition the Department pointed out that Italian professors had been attached to Italian Consulates in certain cities in the United States in the capacity of clerks. While it was said that the full scope of the activities of these persons was not known, it had been ascertained that they had imported and distributed free of charge to public and parochial schools textbooks which were not considered appropriate for use in the education of American children and which had aroused wide-spread criticism. The Department suggested that these individuals also be transferred elsewhere, that no persons charged with such duties be attached henceforth to Italian Consulates in the United States, and that the free distribution in American schools of textbooks printed in Italy be discontinued. The Italian Ambassador stated to the Department that the function of these individuals was the promotion of cultural relations between Italy and American citizens of Italian descent and was legitimate.

The Department replied that it recognized that the distinction between the legitimate promotion of cultural relations and "propaganda" was often indistinct and added:

There is another angle to the picture. It is at least open to serious question whether the activities of the school teacher Vice Consuls including the distribution of textbooks fall within the bounds of normal consular functions. Our authorities feel that they do not. But without pressing this point at the moment, I should point out that these school teacher Vice Consuls are protected by recognized privileges and immunities which not only enshroud their work in a certain mystery but link them directly to the Italian central government in a type of activity which it is not felt should be pursued by that central government in this country. So long as these practices continue the danger of arousing adverse sentiment in this country will persist.

The Department concluded by saying that the danger would be very much reduced "if cultural activities were carried on by some non-official organization, whose functions were known, which enjoyed no immunities, and whose premises were accessible to the public". In reply the Italian Ambassador informed the Department that the Italian Foreign Office had accepted the Department's point of view that the activities complained of did not fall within normal consular functions and that henceforth cultural activities would be divorced from its official representation and confided to an unofficial body.

MS. Department of State, file 811.00F/201, /211, /214.

In April 1937 the Department of State received information that a German consular officer in the United States had brought to the attention of American actors appearing in a certain motion picture the contents of a decree of the German Government to the effect that that Government would refuse permits for films with which persons were connected who had previously participated in pictures considered detrimental to German prestige in spite of warnings issued by the competent German authorities. Officials of the Department of State informally approached officials of the German Embassy with regard to the activity, stating that the availability of the film for admission into Germany was a matter lying between the film company and the German Government, that the activities of individual actors had no connection whatever with the German Government, and that the addressing of such letters to them (except in response to inquiries) was considered not to be within the proper functions of a foreign consular officer. The German Ambassador subsequently

informed the Department that he had instructed the consular officer to refrain from this practice and that this measure had been fully endorsed by his Government.

The German Ambassador in the United States (Dieckhoff) to the Under Secretary of State (Welles), June 9, 1937, MS. Department of State, file 811.4061 Road Back/13.

With reference to an alleged statement of the German Consul General in New Orleans, in June 1940, that "my country will not forget that when she was fighting bitterly for her very life, the United States gave every material aid to her enemies", the Department of State on July 5, 1940 stated:

The matter has been taken up with the German Embassy here, and it has been pointed out that public discussion of questions relating to this country's policies and attitudes does not properly come within the province of foreign government officials in the United States. It was pointed out that permission granted to foreign government officials to continue to remain in this country is dependent on observance of this rule.

New York Times, June 15, 1940, p. 9; Department of State, III *Bulletin*, no. 54, p. 4 (July 6, 1940).

DUTIES WITH RESPECT TO SEAMEN

JURISDICTION

§445

The Consular Regulations of the United States, sections 307, 310, and 311, February 1931, contained the following provisions:

307. *General principle.* It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement. From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship and the general regulation of the rights and duties of the officers and crew toward the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require.—120 *U.S.* 1.

310. *In the absence of treaty.* In the absence of a treaty or convention with the country within which the consular officer resides, he has no jurisdiction in differences and disputes between masters and crews or between American citizens, except in so far as it may be permitted by the foreign State through the exercise of comity, or reciprocity, or by long-established usage. As respects such disputes and differences, the adjustment is to be made, whether under treaty or otherwise, in accordance with the laws of the United States, and not with those of the foreign power. The rule is that all matters growing out of contract with the crew or affecting the police of the ship are subject to the laws of the State to which the vessel belongs. Although such matters may in some countries be submitted to the local tribunals, the proceeding should be discouraged as undesirable in many respects. In countries with which the United States have no treaty or convention, but in which a permissive jurisdiction has been granted or acquired, a consular officer should be careful to avail himself of it.

311. *Rule in United States courts.* While courts in the United States insist upon the right to jurisdiction over foreign merchant vessels when in ports of the United States, except in so far as affected by treaty, they usually decline to exercise it in cases of disputes between masters and seamen of foreign vessels when the nation to which the vessel belongs has provided for the settlement of such disputes before its own consuls, on the ground that such noninterference is necessary to the proper police regulation of the merchant marine of nations. The exceptions to the rule are few, as when a master has been guilty of extreme cruelty, or when there is a manifest disregard of the contract which would operate unjustly to the seaman if he were compelled to await a return to his own country before he could resort to the courts.—*120 U.S., 1.*

NOTE 1. Under the provisions of section 4 of an act of March 4, 1915 [38 Stat. 1165], entitled "An act to promote the welfare of American seamen," etc., the courts of the United States assume jurisdiction over certain disputes regarding wages between masters and seamen of foreign vessels arising in ports of the United States. [See vol. II, pp. 244 *et seq.* of this Digest.]

The former practice of arresting seamen for desertion has been discontinued in the United States as a result of the Seamen's Act of March 4, 1915 (38 Stat. 1164, 1184), and provisions of treaties requiring such arrests were abrogated. See vol. II, ch. VI, §144, of this Digest.

Representative of the treaty provisions entered into by the United States since the passage of this act is article XXIII of the treaty of friendship, commerce, and consular rights between the United States and Germany of 1923 (4 Treaties, etc. [Trenwith, 1938] 4200-4201), reading as follows:

A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels

of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

When an act committed on board of a private vessel under the flag of the State by which the consular officer has been appointed and within the territorial waters of the State to which he has been appointed constitutes a crime according to the laws of that State, subjecting the person guilty thereof to punishment as a criminal, the consular officer shall not exercise jurisdiction except in so far as he is permitted to do so by the local law.

A consular officer may freely invoke the assistance of the local police authorities in any matter pertaining to the maintenance of internal order on board of a vessel under the flag of his country within the territorial waters of the State to which he is appointed, and upon such a request the requisite assistance shall be given.

A consular officer may appear with the officers and crews of vessels under the flag of his country before the judicial authorities of the State to which he is appointed to render assistance as an interpreter or agent.

The conditions and procedure for the enforcement of such provisions are established by law and are set forth in title 22 of the United States Code, §§ 256-258.

Matters of police

With reference to a letter from the United States Shipping Board in 1919 concerning the serious difficulty encountered in maintaining discipline aboard its vessels in foreign ports and inquiring whether the punishment of offenders could be obtained at the foreign ports either by the consul or by the local authorities, the Department of State said:

. . . American Consuls are not possessed of judicial powers in the countries enumerated in your letter and, consequently, . . . are not empowered to try and punish American seamen who may have committed crimes on board American vessels. On the other hand, the Department begs to invite your attention to Sections 350-360 [Consular Reg. U. S., May 1930] inclusive, and particularly to Sections 353 and 354 of the United States Consular Regulations, 1896, which indicate the considerable ministerial or police power under which Consuls may cause the detention of an accused seaman and effect his return to the United States for trial.

As to the assumption of jurisdiction by local authorities the Department stated that, while conceding the amenability of vessels to local jurisdiction, matters relating exclusively to the internal discipline of

the vessel and not involving the peace or dignity of the port should, as a matter of comity, be left by the local government to be dealt with by the authorities of the nation to which the vessel belongs. (See vol. II, ch. VI, §140, of this Digest.)

The Department said that "In view of this principle of international comity, it may be a matter for serious consideration what steps, if any, it would be desirable to take in order to obtain the trial of such offenders by the local authorities, especially when these authorities are reluctant to assume jurisdiction."

The Second Assistant Secretary of State (Adee) to the United States Shipping Board, Dec. 9, 1919, MS. Department of State, file 196.3/245.

The Department of State was informed in 1916 that a seaman on an American vessel who was a native and resident of Barbados had left the vessel in that place and had been declared a deserter by the American Consul. The seaman then brought suit against the vessel in a local court, and damages were awarded him in the amount of his wages. After informing the Consul that his action was proper, the Department said that "in the absence of any treaty stipulations excluding jurisdiction of local authorities over controversies between masters and seamen respecting wages, the rights of courts to take jurisdiction in cases of this kind would appear to depend entirely upon local laws and practices of the local courts. There appear to be no treaty stipulations between this Government and the Government of Great Britain bearing on the case referred to in your despatch." Consul Livingston to Secretary Stimson, no. 46, July 26, 1916, and the Department of State to Mr. Livingston, no. 37, Sept. 27, 1916, MS. Department of State, file 196.5/39.

In 1926 a seaman who had deserted from a German merchant vessel shipped on an American vessel in the East Indies. Upon its arrival at Surabaya, Java, the authorities desired to arrest the seaman for the purpose of returning him to the German vessel and refused to grant the American vessel clearance until this demand had been complied with. The Department of State instructed the Consul at Batavia, Java:

"In the absence of any applicable treaty provision, and in view of the fact that merchant vessels in the ports of a foreign country are in general subject to the jurisdiction of that country, it is believed that, in this case, the authorities at Soerabaya were justified in demanding the surrender of the seaman in question, who it appears was a German subject who had previously deserted from a German ship, notwithstanding the fact that at the time the demand was made he was a member of the crew of an American vessel."

The Department pointed out that the treaties between the United States and the Netherlands providing for the arrest of seamen deserting from Netherlands vessels in ports of the United States had been abrogated pursuant to the Seamen's Act of 1915 (38 Stat. 1184-1185). Consul Hoover to Secretary Kellogg, no. 843, May 3, 1926, and Assistant Secretary Harrison to Mr. Hoover, July 26, 1926, MS. Department of State, file 196/503. As to the effect of the Seamen's Act of 1915 on treaties concerning jurisdiction over seamen, to which the United States was a party, see vol. II, ch. VI, §144, of this Digest.

As a result of mutiny on board an American vessel in a Mexican port involving seamen who were citizens of Mexico, it appeared that Mexican officials refused to allow the vessel to load and clear unless they were given jurisdiction over these Mexicans. The Department of State instructed the Embassy in Mexico:

By signing on American steamship *Harvester* the Mexican citizens became subject to laws of the United States and should be treated as other members of crew of vessel without regard to their citizenship. . . . Since Mexican Government has not claimed jurisdiction over offenders and offense apparently did not involve tranquillity of port, Department believes Mexican authorities should not interfere in the execution of American laws. Inform proper authorities of this view and informally urge that vessel be permitted to discharge and load cargo without further delay.

In response to an inquiry as to the attitude taken by the United States in similar circumstances, the Department sent the following instruction:

Unless mutiny clearly involves the peace of the country or tranquillity of the port, United States would not exercise jurisdiction. This would apply in all cases of mutiny whether or not officers and members of crew are wounded. Only in very unusual circumstances would this country claim jurisdiction.

Orders were then given to permit the vessel to load and clear without restriction.

The Counseior of Embassy (Summerlin) to the Secretary of State (Hughes), telegram 116, June 2, 1921, and Mr. Hughes to Mr. Summerlin, telegram 82, June 4, 1921, MS. Department of State, file 14052 294; Mr. Summerlin to Mr. Hughes, telegram 135, June 10, 1921, and the Acting Secretary of State (Fletcher) to Mr. Summerlin, telegram 90, June 14, 1921, *ibid.* 19632 312; Mr. Summerlin to Mr. Hughes, telegram 142, June 16, 1921, *ibid.* 19632 322.

In 1911 a seaman on an American vessel was confined to a hospital in Mexico as a result of injuries received in an affray on board the vessel while in a Mexican port. A hearing in the case was held before the local court, and the assailant was made a prisoner subject to the disposition of a federal judge. The American Consul brought the matter to the attention of the judicial authorities, claiming that the incident having occurred aboard an American vessel and not having affected the peace of the port, it was properly within the jurisdiction of the United States, whereupon the assailant was discharged. In as much as the injuries were not serious and the incident was of minor importance, the Consul did not take steps to send the accused to the United States for trial. His action was approved. The Consul at Hermosillo, Mexico (Hostetter), to the Secretary of State (Knox), no. 330, Feb. 16, 1911, and the Director of the Consular Service (Carr) to Mr. Hostetter, Mar. 6, 1911, MS. Department of State, file 1958/5.

The Circuit Court of Appeals for the Ninth Circuit held, in 1919, that article 11 of the consular convention of 1878 between the United States and the Netherlands (2 Treaties, etc. [Malloy, 1910] 1258) was **Treaty** in force, giving consuls exclusive jurisdiction over disputes between master and crew of vessels of the consul's country; and that the courts of the United States had no jurisdiction over a dispute in which the crew of a Netherlands vessel demanded transportation home. The court pointed out that "It is undisputed that the court below had jurisdiction over the claims of the libelants respecting their wages" by virtue of the Seamen's Act of 1915, 38 Stat. 1165; 46 U.S.C. §597.

The Rindjani, Adam et al. v. Griep et al., 254 Fed. 913, 914 (C.C.A. 9th, 1919). The Circuit Court of Appeals for the Fourth Circuit held in 1940 that under section 597, title 46, of the United States Code, it was mandatory for United States courts to take jurisdiction of a wage dispute between master and seamen of a Greek vessel, notwithstanding article XII of the consular convention of 1902 between the United States and Greece, 1 Treaties, etc. (Malloy, 1910) 853, conferring such jurisdiction exclusively on Greek consuls. The court pointed out that this article had been abrogated by agreement with Greece in 1916 (see 1916 For. Rel. 41-42), and in any event was superseded by the later and inconsistent act of 1915. *Lakos et al. v. Sallaris; The Leonidas*, 116 F. (2d) 440 (C.C.A. 4th, 1940). In the lower court jurisdiction of the dispute had been declined. *The Leonidas*, 32 Fed. Supp. 738. See, to similar effect, *The Cambitsis*, 14 F. (2d) 286 (E.D. Pa., 1926), and *Athanasios Veziris v. S. S. Tasiarchis*, 1940 A.M.C. 318 (E.D.N.Y.). A decision of the Circuit Court of Appeals for the Ninth Circuit in 1934 declining jurisdiction in a tort case on the basis of article XIII of the treaty of commerce and navigation of 1827 between the United States and the Kingdom of Sweden and Norway, 2 Treaties, etc. (Malloy, 1910) 1752, was reversed by the United States Supreme Court, which held that the treaty was no longer in force at the time the plaintiff was injured and that the court had jurisdiction. *Van der Weyde v. Ocean Transport Co., Ltd. et al.*, 297 U.S. 114 (1936), reversing *The Taigen Maru, Van der Weyde v. Ocean Transport Co., Limited, et al.*, 73 F. (2d) 922 (C.C.A. 9th, 1934). In a case arising in 1938 involving article 22 of the treaty concerning friendship, commerce, and consular rights of 1928 between the United States and Norway (4 Treaties, etc. [Trenwith, 1938] 4536), providing that consuls "shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto, provided, however, that such jurisdiction shall not exclude the jurisdiction conferred on local authorities under existing or future laws", it was held by the Circuit Court of Appeals for the Third Circuit that the District Court was justified in declining jurisdiction of a suit involving wages of Norwegian seamen. The court noted that the treaty was subsequent to the statute. *The Estrella, Myklebust et al. v. Meidell*, 102 F. (2d) 736 (C.C.A. 3d, 1938); certiorari denied, 306 U. S. 658 (1939). For a case in which jurisdiction of a tort action arising on board a ship was declined on the basis of the German treaty of 1923 (*ante*, p. 877), see *Simpson v. Hamburg-American Line*, 1939 A.M.C. 1469 (D.C. C.Z.) The court said that it had arrived at the conclusion that—"the phrase 'Internal order' not only refers to the

decorum, behavior, conduct and discipline of the crew and the officers, but, on the other hand, it covers all that occurs inside the ship with reference to the management, control and work of the ship by the crew and the officers, and any disputes and differences that may arise between them, or any failure of duty on the part of any member of the crew or officers. In other words, to all that is done in the ship in the promotion of the master's business by the crew or by the master through his officers and servants." *Ibid.* 1480.

In an appeal from a decree of the District Court of the United States for the Eastern District of New York dismissing the libel of a seaman against a Danish vessel for injuries sustained in the service of the vessel, the claimant contended that the decree should be affirmed by virtue of the provision of the treaty between the United States and Norway referred to *ante*, and a most-favored-nation clause in force between the United States and Denmark. Without deciding that the Norwegian treaty was applicable, the Circuit Court of Appeals rejected the contention on the ground that the controversy in question was not included in the phrase "controversies arising out of the internal order of private vessels", which appears in the treaty. This was *obiter dictum*, however, as the decree was affirmed on other grounds. *The Paula*, 91 F. (2d) 1001 (C.C.A. 2d, 1937), affirming 17 F. Supp. 555 (E.D.N.Y., 1937).

Cooperation
of local
authorities

The treaty concerning friendship, commerce, and consular rights between the United States and Norway of 1928 contains an article (XXII), 4 Treaties, etc. (Trenwith, 1938) 4536, relating to seamen similar to that contained in the German treaty quoted *ante*, this section, and provides particularly that "A consular officer may freely invoke the assistance of the local police authorities in any matter pertaining to the maintenance of internal order on board of a vessel under the flag of his country within the territorial waters of the State to which he is appointed, and upon such a request the requisite assistance shall be given."

The crew of a Norwegian vessel arriving in Philadelphia, in March 1938, engaged in a sit-down strike at that port and refused to leave the vessel, although directed by the master to receive their wages and discharges before the Norwegian Consul. The articles stipulated for discharge in the United States. The Consul requested assistance from the local authorities, which was refused. A libel was then brought by the master in the District Court of the United States for the Eastern District of Pennsylvania and was dismissed on motion for want of jurisdiction, the decision being based upon the treaty provision which the court held conferred such jurisdiction exclusively upon the Consul. The matter was subsequently brought to the attention of the Department of State with a request that assistance be rendered as provided in the treaty. It appeared, however, that the presidential proclamation required by title 22, §256, of the United States Code had not been made with respect to the treaty.

The Norwegian Minister notified the Department that the condition of reciprocity required by that section was satisfied by the applicable provisions of Norwegian law, and the President proclaimed title 22, §§256-258, of the United States Code to be in force as to Norway. It appears that the striking crew members thereafter left the vessel.

The Wind, 22 F. Supp. 883 (E.D. Pa., 1938); the Norwegian Minister to Secretary Hull, Apr. 1 and 2, 1938, MS. Department of State, file 711-572/129, /131; 3 F.R., no. 70; memorandum of the Counselor of the Department of State, Apr. 11, 1938, MS. Department of State, file 711.572/139.

In 1934 an American Consul in Turkey reported that a Turkish decree had been interpreted to prohibit consuls from visiting vessels in port. The Department of State instructed the Ambassador in Turkey that such an interpretation appeared to be contrary to well-established international practice and to treaty provisions to the benefits of which the United States was entitled by an exchange of notes of February 17, 1927 with Turkey. In August 1934 the Embassy reported that it had been informed by the Foreign Office that the Consul at Smyrna (Izmir), at which port the difficulty had arisen, might freely visit American vessels.

The Consul at Izmir (George) to the Secretary of State (Hull), telegram of May 28, 1934, and the Acting Secretary of State (Phillips) to the Ambassador in Turkey (Skinner), telegram 56, June 2, 1934, MS. Department of State, file 867.801/30; the Counselor of Embassy (Shaw) to Mr. Hull, telegram 63, Aug. 20, 1934, *ibid.* 867.801/33. As to the exchange of notes, see vol. I, p. 312, of this Digest.

WHO ARE AMERICAN SEAMEN

§446

The Foreign Service Regulations provide that, for the purpose of the Regulations, the term "seamen" shall include "every person (apprentices excepted) who shall be employed on a vessel or engaged to serve in any capacity thereon. (46 U.S.C. § 713)" and that the term "American seamen" shall be deemed to include: "(a) Seamen who are native-born or fully naturalized citizens of the United States" and "(b) Aliens who have acquired and maintained the character of American seamen". It is further provided:

. . . An alien can acquire the character of an American seaman for the purposes of protection and relief under the laws of the United States only by shipping on a vessel of the United States in a port of the United States before a shipping commissioner. Having once acquired such status, he may thereafter reship on any American-owned vessel either in a foreign port or in a port of the United States without losing his rights and privileges as an American seaman.

However, if an alien having the status of an American seaman, deserts from an American-owned vessel except as a result of cruel or unusual treatment, or ships on a foreign vessel, or definitely abandons his calling as a seaman, he forfeits his status as an American seaman.

For. Ser. Reg. U.S. XVI-2, nn. 1, 2, and 3, June 1941.

The term "seaman" is discussed in *Warner, Administratrix v. Goltra*, 293 U.S. 155 (1934).

In 1931 a question arose as to the administration of an estate of a deceased American citizen who had been employed on an American dredge in Mexican waters. The consul reported that the crew was signed on and discharged before the port captain at Tampico in accordance with the Mexican labor laws and that the employment was on a month-to-month basis. The Department instructed the consul that in the circumstances it was not necessary to treat the estate as that of a deceased American seaman. The Department of State to Consul Macy, May 6, 1931, MS. Department of State, file 312.113 Clifton, Luke/11; Mr. Macy to Secretary Stimson, no. 125, May 11, 1931, *ibid.* 312.113 Clifton, Luke/12; the Department of State to Mr. Macy, May 21, 1931, *ibid.* 312.113 Clifton, Luke/13.

In instructing the American Ambassador to present to the Chinese Government certain information regarding injuries sustained by passengers and members of the crew of an American vessel, the Department of State said that "irrespective of nationality of surviving members of crew, they are, as American seamen on American vessel, regarded as entitled to this Government's assistance".

The Secretary of State (Hull) to the Ambassador in China (Johnson), telegram 360, Nov. 19, 1937, MS. Department of State, file 393.115 President Hoover/76.

The Department of State, in 1916, instructed a consul as follows:

Aliens
shipped in
foreign
ports

... a foreigner shipping on an American vessel in a foreign port while having the status of an American seaman so far as shipping and discharge are concerned, has not the rights of such seamen to advance and extra wages as stated in paragraphs 237 and 248 of the Consular Regulations, nor is he entitled to relief except in cases of shipwreck as provided for in paragraph 271 of the Consular Regulations.

The Third Assistant Secretary of State (Phillips) to the Consul at Acapulco, Mexico (Edwards), no. 69, Feb. 11, 1916, MS. Department of State, file 196.2/179.

Sections 237 and 248 of the Consular Regulations as of 1916 have been canceled; section 248 was amended (Jan. 29, 1937) to read as follows:

"A seaman who is a foreigner and who is shipped in a foreign port and discharged in a foreign port is not entitled to extra wages upon discharge. (Fed. Case No. 16002.)" 2 F. R. 222.

It was provided in section 249 of the Consular Regulations that "The rule is, that a foreigner discharged from an American vessel in a foreign port, and subsequently shipping on a foreign vessel, can not thereafter be deemed an American seaman for the purposes of extra wages and

relief until he returns to the United States and again ships on an American vessel."

See also *post*, pp. 915-916.

The Department of State, in 1938, instructed a consul in France, with reference to the American master of a French yacht:

... you should take up Mr. Reeves' passport and advise him that during the time he is acting as the master of a foreign vessel he cannot expect to receive the protection of the United States and can look for protection only to the country under whose flag he serves.

Service
on foreign
vessels

The Department of State to the American consular officer in charge at Marseille, Feb. 23, 1938, MS. Department of State, file 130 Reeves, George E.

SHIPMENT

§447

It was provided in the Consular Regulations of the United States, section 189 (Ex. Or., Oct. 16, 1937, 2 F. R. 2237):

Shipment of seamen in foreign ports. (a) Every master of a merchant vessel of the United States who engages any seaman at a place out of the United States, in which there is a consular officer shall, before carrying such seaman to sea, procure the sanction of such consular officer, and shall engage seamen in his presence; and the rules governing the engagement of seamen before a shipping commissioner in the United States shall apply to such engagements made before a consular officer; and upon every such engagement the consular officer shall endorse upon the articles of agreement his sanction thereof, and an attestation to the effect that they have been signed in his presence and otherwise duly made [form no. 16]. (46 U.S.C. §570.)

... The provisions of this paragraph are not applicable to contracts whereby fishermen ship for a share in the catch. (25 Fed. Rep. 856; 46 U.S.C. §§531, 544.)

(b) *Shipments on provisionally registered or undocumented American-owned vessels.* Vessels granted provisional certificates of registry (sec. 342) are subject to the laws of the United States regarding shipment, discharge, relief, and transportation of seamen. ... (46 U.S.C. §12.)

In the case of undocumented American-owned vessels abroad, incapable of proceeding to the United States (sec. 343), the crews are usually made up of men who are not American citizens or American seamen. Seamen of this class when not serving under a contract made in the United States are not regarded as within the jurisdiction of the consular officer as to their shipment or discharge. Seamen engaging on such vessels who are American citizens, and foreigners who have acquired and maintained the

status of American seamen are to be shipped and discharged before the consular officer in the same manner as seamen on regularly documented vessels.

(c) *Shipments at ports where no consular officer or at sea.* Where seamen are shipped at ports where there is no consular officer or at sea, report is made to the consular officer at the first port at which the vessel arrives and the seamen are then formally shipped before such officer. . . .

(d) *Shipments not required to be made before consular officer.* The shipment of seamen on vessels engaged in the trade between the United States and the Dominion of Canada, or Newfoundland, or the West Indies, or the Republic of Mexico, is not required to be made before a consular officer (46 U.S.C. §§563-564); nor are seamen on fishing vessels or on enrolled or licensed yachts required to be shipped before such officers. Upon request, however, seamen on vessels of the United States engaged in any trade may be shipped before a consular officer.

46 U.S.C. §569 provides that in case of the loss of seamen by desertion or casualty the master must ship an equal number of the same or higher rating, if obtainable, "and report the same to the United States consul at the first port at which he shall arrive". Compare §189 (c) *ante*.

"This Department therefore, feels warranted in stating that in its opinion American consuls when supervising the shipment of seamen under the provisions of Section 4517 Revised Statutes, may exercise all the powers vested by law in shipping commissioners, including that of examining and approving allotments." The Acting Secretary of Commerce (Morgan) to the Secretary of State (Stimson), Sept. 30, 1932, MS. Department of State, file 196.6/1159.

"Only foreign seamen actually needed to fill vacancies, and American seamen being repatriated, should be shipped in foreign ports; and it should always be determined by suitable investigation that they are bona fide seamen." The Assistant Secretary of State (Carr) to American consuls at seaports, June 24, 1929, MS. Department of State, file 196.2/S38a.

DISCHARGE

§418

It was provided in the Consular Regulations of the United States, section 200 (Ex. Or., Oct. 16, 1937, 2 F. R. 2237, 2238) :

Authority of consular officers to discharge seamen. A consular officer is authorized to discharge a seaman upon the application of the master of any vessel or upon the application of any seaman for his own discharge, if it appears to such officer that the seaman has completed his shipping agreement or is entitled to his discharge under any act of Congress or according to the general principles or usages of maritime law as recognized in the United States. (46 U.S.C. §682.)

It was provided in section 201 of the Consular Regulations (Ex. Or., Oct. 16, 1937, 2 F. R. 2237, 2238) that masters of American vessels

bound on foreign voyages should account on their return for all members named in the crew list, as provided by the statute, and it was stated:

. . . However, the penalty is not incurred for failure to produce any person named in the crew list who has been discharged in a foreign country with the written consent of a consular officer, certified under his hand and official seal, to be produced to the collector with the other persons composing the crew, nor on account of any such person dying, absconding, or being forcibly impressed into other service, of which satisfactory proof shall also be exhibited to the collector of the port. (46 U.S.C. §677.) The master cannot lawfully discharge a seaman in a foreign port without the intervention of the consular officer; and it is not material in such case that the discharge is made with the seaman's consent or that he has misconducted himself, or is not a citizen of the United States. (7 Op. Att. Gen. 349.) (See also sec. 218.)

The master of an American vessel, while at a Peruvian port at which there was no American Consul, inquired of the Consul at Callao whether he could discharge a member of his crew for insubordination without the intervention of the Consul. The Consul replied in the negative and subsequently reported the matter to the Department of State, which said that "As to the discharge of seamen, there is no law permitting their discharge before the termination of their shipping contract without the intervention of the consular officer." Consul General Robertson to Secretary Bryan, no. 204, Mar. 11, 1912, and the Director of the Consular Service (Carr) to Mr. Robertson, no. 149, Apr. 11, 1912, MS. Department of State, file 196.4/20.

"It appears that an American seaman can lawfully be discharged in a foreign port only by an American consular officer and that the master of the vessel to which the seaman belongs must ordinarily be present when the seaman is discharged. The personal appearance of the master before the consular officer may be waived in cases where a seaman is to be discharged because of incapacity for service occasioned by injury or illness if he can not proceed with the seaman to the consul without risk to the crew, the vessel or the cargo." (46 U.S.C. §683.) The Director of the Consular Service (Carr) to the Consul at Marseille (Frost), Mar. 22, 1923, MS. Department of State, file 196.32/473.

In the case of the discharge at the port of Algiers of the crew of a British vessel for "incompetence" without the intervention of a British Consul, the crew later sued the vessel in New York (at which port they had shipped) for their wages to the end of the voyage. As to the failure to discharge the men before the Consul, the court said:

So it makes no difference whether this was a case of strict discharge or leaving behind; the master did not do what the law required of him, and was in any event guilty of a misdemeanor. It is hornbook law for masters that discharges must be approved by consuls, and the law of the United States is in substance the same. Rev. St. §§4580, 4581 (Comp. St. §§8371, 8372). That the master thus violated the law, and did not get the "sanction"

indorsed upon the articles, or a "certificate" stating the causes, is to my mind of the utmost significance. Ship's articles are intended to be the authoritative evidence of the agreement, and the visé of the consul is expressly to protect seamen (and, indeed, masters as well) from just the uncertainties which arise from disputes like this. I do not believe that any master, with a good case against his crew for "incompetence" (Rev. St. §4581), or "unfitness" (British Merchant Shipping Act, §188), would have discharged the whole body of them without this protection to himself. Least of all would he have omitted this precaution, if, as he says, they were all willing to be discharged, and there could have been no dispute to settle and no doubt of the result.

Therefore it seems to me as clearly proved as such facts can be that the discharge was colorable, a cover to avoid the continued payment of American wages.

Mattes et al. v. Standard Transp. Co., 274 Fed. 1019, 1023 (S.D.N.Y., 1921).

A seaman on an American vessel in a foreign port in 1917 complained to the consul concerning his treatment, without first consulting the master. After a hearing, and upon the consul's direction, the seaman was discharged and his wages paid. In a suit brought by the seaman in the United States for further wages, maintenance, and transportation, the court held for the vessel, stressing the fact that the complaint was brought by the seaman without notice and that the discharge was at the consul's direction. The court also said that the consular certificate was *prima-facie* evidence of discharge placing the burden of proof on the libellant.

The Oregon, 254 Fed. 752 (E.D.N.Y., 1918).

It was provided in the Consular Regulations of the United States, section 202 (Ex. Or., Oct. 16, 1937, 2 F.R. 2237, 2239; Ex. Or., Feb. 28, 1938, 3 F. R. 485):

**Cause
for
discharge**

Cases in which seamen may be discharged. The usual cases in which American seamen are discharged, upon payment of wages, in a foreign port by consular officers, under the provisions of the statutes and the principles of maritime law, may be stated as follows:

- (1) For misconduct of the seaman. (36 Fed. Rep. 442.) (See also secs. 204, 205.)
- in violation of the article of shipment. (46 U.S.C. §685.) (See §684.) (See also secs. 251, 252.)
- (3) When the seaman has completed his shipping agreement. (46 U.S.C. §§ 682, 684.)
- (4) Upon the complaint of the seaman that the voyage is continued contrary to agreement and the consular officer is satisfied that the voyage has been designedly and unnecessarily prolonged in violation of the article of shipment. (46 U.S.C. §685.) (See also sec. 243b.)

(5) For cruel and unusual treatment. (46 U.S.C. §§ 703, 712.) (See also secs. 205, 243b.)

(6) After a report by inspectors that the vessel was sent to sea unsuitably provided in any important or essential particular, by neglect or design, and the consular officer approves such finding, and the crew, or any of them, request a discharge. However, if . . . the difficulties or deficiencies . . . have been the result of mistake or accident, . . . and the master shall in a reasonable time remove or remedy the causes of complaint, the crew shall then remain and discharge their duty. (46 U.S.C. §658.) (See also sec. 243c.)

(7) On account of illness or injury incapacitating the seamen for service. (46 U.S.C. §683.) (See also sec. 207.)

(8) By mutual consent of master and seaman. (46 U.S.C. §683.) (See also sec. 243a.)

(9) When the seaman is arrested and awaits trial for offense against local laws abroad or is imprisoned for such an offense, or is held as a witness; when also he is sent to the United States as a prisoner or witness.

(10) When a seaman is transferred to another vessel in a foreign port, or when he is promoted to be an officer of the vessel, or when an officer is disrated to the grade of seaman, or when any member of the crew is disrated. (9 Fed. Rep. 222; 290 Fed. Rep. 806.)

(11) When the vessel is wrecked, destroyed, lost, stranded, or condemned as unfit for service. (See also sec. 228.)

(12) When the master is superseded by the majority owners and a new master appointed (46 U.S.C. §227), or when he is removed by the consular officer. This clause does not refer to the crew, who are not entitled to be discharged when the master is thus superseded or removed. (See sec. 208.)

(13) When the master fails to comply with the following provision of law: . . . [quoting 46 U.S.C. Supp. §673.]

With reference to a report that an American vessel in a foreign port was unable to pay its crew and that allotments to families of crew members were unpaid, the Department of State instructed the consul that it had been informed by the Department of Commerce that non-payment of allotments constituted sufficient cause for the discharge of the seamen.

**Non-payment
of allot-
ments**

The Acting Secretary of State (Davis) to the Consul at Habana (Hurst), telegram of Dec. 9, 1920, MS. Department of State, file 196.7/1420.

Hamilton et al. v. United States is an important precedent in cases involving demands of crews for their discharge because the voyage was continued "contrary to agreement" (46 U.S.C. §685) by virtue of the expiration of the shipping articles. In this case the American vessel *Poughkeepsie* was delayed for repairs in the Azores beyond the date stipulated in the shipping articles for the termination of the voyage in New York. The crew thereupon demanded their wages and

**Expiration
of articles**

transportation to New York and upon refusal of the demands declined to work, while remaining on the vessel, despite a request by the American Consul that they return to work. The seamen were brought to trial in the United States and convicted under section 292 of the Criminal Code (18 U.S.C. §483; inciting revolt or mutiny on ship-board). With reference to the defense that the voyage had terminated at the time of the alleged offense, the Circuit Court of Appeals for the Fourth Circuit, affirming the conviction, said:

The first position is clearly untenable. Section 4511, Revised Statutes, and amendments [46 U.S.C. §564] . . . for the protection of seamen, relate to the voyage, and impose duties on the ship and seamen for the voyage. Neither can renounce those duties during the voyage. These statutes on their face, and the judicial construction given them, leave no doubt of these conclusions: (1) The master cannot discharge the crew, and the crew cannot demand wages in full, until the end of the voyage; (2) the end of the voyage is not a port of distress, but the port of destination; (3) seamen are bound to serve until the voyage ends in the port of destination, unless there has been a breach of the contract by the master as to the time of the voyage or in some other material particular; (4) extension of the time of the voyage by intention or neglect of the master is such breach of the contract as entitles the seamen to demand their release on that ground in any safe port; (5) but extension of the voyage beyond the time mentioned in the contract, due to perils of the sea which the master or owner could not be reasonably expected to guard against, is not a breach of the contract as to time, and does not warrant seamen in leaving the vessel or demanding wages in full before reaching the port of destination; (6) on the other hand, seamen are entitled to their wages and discharge when the ship reaches the port of destination before the expiration of the stipulated time of the voyage. . . . There was no demand for release and payment of wages on the ground that the voyage had been extended by the willful or negligent action of the owner or master, and the proof did not require the conclusion that the extension of the voyage was due to that cause.

268 Fed. 15, 17-18 (1920); certiorari denied, 254 U.S. 645 (1920). See also *Shanley et al. v. United States*, 294 Fed. 302 (C.C.A. 2d, 1923), reversing 274 Fed. 691 (E.D.N.Y., 1921); *Uriarte v. United States*, 14 F. (2d) 164 (E.D.N.Y., 1926).

An American Consul, in 1920, inquired of the Department of State as to the right of the crews of American vessels to their discharge upon expiration of the time-limit of their shipping articles in view of the above-quoted decision in the *Hamilton* case. The Department of State said:

"Under the provisions of the decision referred to it would appear that when a vessel is detained in a foreign country beyond the time mentioned in the contract due to perils of the sea which the master could not be reasonably expected to guard against, it is not a breach of the contract as to time and does not warrant the seamen in leaving the vessel or

demanding wages in full before reaching the port of destination. It would appear, therefore, that if an American vessel is detained abroad by intention or neglect of the master, the seamen of that vessel will be entitled to discharge with a month's extra wages and transportation to the United States. The cause of the detention abroad appears to be the fact upon which the decision must be based." The Consul General at London (Skinner) to the Secretary of State (Colby), no. 10297, Oct. 20, 1920, and the Director of the Consular Service (Carr) to Mr. Skinner, Nov. 5, 1920, MS. Department of State, file 196.4/417.

The American Consul at Marseilles reported to the Department of State, in 1938, that the crew of an American vessel was demanding to be discharged on the complaint that the voyage was being continued contrary to agreement. The report was sent on May 5, 1938, and the articles stipulated that the voyage should terminate at New York not later than May 23, 1938. Since the vessel was then loading for Barcelona it was said to be most improbable that it could reach the United States before June 4. The Department instructed the Consul that, since the articles had not expired and since it was the general policy of the laws of the United States to discountenance the discharge of seamen in foreign ports, particularly where the vessel might be homeward bound, the Department was of the opinion that the complaint of the seamen was insufficient to justify their discharge under title 46, § 685, of the United States Code. Consul Hurley to Secretary Hull, telegram of May 5, 1938, and Mr. Hull to Mr. Hurley, telegram of May 6, 1938, MS. Department of State, file 196.32/639.

In 1940 the crew of an American vessel in a port in India made a demand on the master for half wages under section 597, title 46, of the United States Code (*post*, p. 901), which the master refused. The following day he agreed to meet the demand, but the crew insisted that the articles had been breached and refused to work the vessel. The Department of State instructed the American Consul at Madras that the following statement had been received from the Department of Commerce:

Breach of
articles

... You are advised that under the statute a reasonable time is allowed the master to comply with such request considering circumstances of his situation. If conditions as reported are correct men should be advised that they are not within their rights in demanding discharge, and should they persist the captain would be at liberty to procure their removal from the ship.

The crew was persuaded to continue with the vessel, and the dispute was later presented to the Consul at Port Said, Egypt, whom the Department instructed:

... After consultation with Department of Commerce, Department is of the opinion that the master cannot properly refuse advances on the basis of crew's previous conduct. The Department cannot give an opinion as to whether master's subsequent offer of payment will relieve the vessel from any penalties which might be incurred because of his previous refusal. In view

of the fact that voyage has been continued from Colachel without settlement of grievance, suggest you urge crew to remain with vessel, and submit case for settlement upon arrival in United States.

Members of the crew refused to continue with the vessel beyond that port and were given their discharge. They demanded a month's extra wages (under 46 U.S.C. §685; see *post*, p. 900) on the ground that the articles had been breached, and this sum was collected by the consul and held by him pending determination of the question under section 253, part II, of the Consular Regulations of the United States. The seamen were later repatriated to the United States, where some of them were convicted under section 483, title 18, of the United States Code of endeavoring to make a revolt on shipboard. In affirming the conviction the Circuit Court of Appeals for the Second Circuit made the following comment regarding breach of articles by reason of the refusal of the demand for half wages:

The appellants contend that by virtue of the above mentioned statute the master's refusal of their demand for half wages on March 4th released them from their contract, and any offer on the following morning to pay the draw was immaterial. The trial judge in effect charged that, if such offer was made, the shipping articles were not broken and the crew had no right to disobey any of the captain's orders. The cases interpreting the statute indicate that the drastic consequences resulting from a refusal of the seaman's demand require a certain liberality in determining what shall be considered as constituting a refusal. They hold that the master must be given a reasonable time—at least if he requests it—in which to ascertain the situation and meet the demand; further, the demand must be made in good faith and may not be used to obtain a technical breach of the articles in order to enable the men to abandon a ship which for other reasons they no longer wish to serve. *The Havenside*, D.C. N.Y., 14 F. 2d 851; *The Tairoa*, 2 Cir., 297 F. 449; *The Hougomont*, 2 Cir., 272 F. 881; *The Pinna*, 5 Cir., 255 F. 642; *The Belgier*, D. C. N.Y., 246 F. 966. In all of these cases the technical breach was not given effect because the master was not granted a reasonable time in which to meet the demand, or because the demand was not made in good faith.

The court decided that the question whether the crew acted in good faith and also the question whether the refusal of a *bona-fide* demand might be vitiated by its prompt retraction did not need to be decided in this case for the following reasons:

... If the master's refusal constituted a breach of the shipping articles, the seamen were privileged to treat it as a total breach which terminated all their rights and obligations as members of the crew. In this event they were no longer entitled to remain on board and occupy the quarters of the crew.

The statute merely gave them the right to full pay to date and the privilege of leaving the service of the ship without being chargeable with desertion and resulting forfeiture of pay; it did not give them the right to stay on board and do as little or as much work as they choose.

The court said that the crew could not assert their rights as members of the crew and deny their duties as such, and that as "they made no move to leave the ship despite their assertion that their contracts were ended . . . they remained as members of the crew and as such were subject to the master's orders".

The steamship company contended that conviction of the crew members was a complete adjudication that the master had not broken the ship's articles, and demanded the return of the extra wages paid the Consul at Port Said. The Department, upon receiving assurances that the case against the members of the crew had been definitely concluded, returned the funds to the company.

The Secretary of State (Hull) to the Consul at Madras (Jordan), telegram of Mar. 14, 1940, MS. Department of State, file 196.32/668; the Consul at Aden (Cowan) to Mr. Hull, telegram 6, Mar. 24, 1940, and Mr. Hull to the Consul at Port Said (Riggs), telegram 4, Mar. 28, 1940, *ibid.* /670; the Vice Consul at Port Said (Squire) to Mr. Hull, no. 56, Apr. 11, 1940, *ibid.* /678; *United States v. Albers et al.*, 115 F. (2d) 838, 835-836 (C.C.A. 2d, 1940); Kirlin, Campbell, Hickox, Keating & McGrann to the Assistant Secretary of State (Long), Sept. 12, 1940, MS. Department of State, file 196.32/708; Mr. Long to Kirlin, Campbell, Hickox, Keating & McGrann, Mar. 12, 1941, *ibid.* /715; the Chief of the Division of Accounts of the Department of State (Corrick) to Kirlin, Campbell, Hickox, Keating & McGrann, Mar. 26, 1941, *ibid.* /721.

The Attorney General ruled, on Aug. 9, 1927, that the provisions of section 4583 of the Revised Statutes (46 U.S.C. § 685), requiring the payment of a month's extra wages to seamen discharged in a foreign country on the complaint "that the voyage is continued contrary to agreement", should not be applied by consuls when the complaint alleges violation of section 2 of the act of Mar. 4, 1915 (46 U.S.C. § 673), relating to division of watches, hours of work, etc. 35 Op. Att. Gen. (1925-29) 292.

An American Consul in Egypt reported to the Department of State in 1916 that American citizens serving as seamen on a British vessel objected to continuing the voyage following the mounting of a gun on the vessel. The Department instructed the Consul as follows:

Without knowledge of nature contract of employment, size of gun mounted, or applicable provisions British law, Department unable indicate what, in its opinion, are legal rights these American citizens who embarked as seamen on British vessel. Department, however, does not consider seamen should be compelled continue on voyage after mounting of gun unless, under

British law, contract of employment bound them so to do. If, in your opinion, they are clearly not so bound, you will urgently renew request for discharge and insist on discharge, without unearned wages or return passage, of those who desire it under those conditions.

The Consul at Alexandria (Garrels) to the Secretary of State (Lansing), Jan. 4, 1916, MS. Department of State, file 841.864/94; Mr. Lansing to Mr. Garrels, telegram of Jan. 14, 1916, *ibid.* 841.864/95.

Unseaworthi-
ness of

In *Hamilton et al. v. United States (ante)* one of the defenses was that the vessel was unseaworthy. In rejecting this contention, the Circuit Court of Appeals said:

Inherent in the shipping articles was the absolute obligation of the owners and operators to see that the vessel was seaworthy. . . . The correlative duty on the part of seamen is to serve until the end of the voyage. But they are not bound to serve on a vessel which is unseaworthy . . .

But the presumption is in favor of seaworthiness . . . The importance of obedience and discipline on a ship, to the end that it may proceed on its voyage, imposes on the crew, after they have commenced the voyage, the duty to use reasonable means to ascertain the actual condition of the vessel, including a resurvey, if that be practicable, before refusal to serve for unseaworthiness. . . .

. . . There is not a particle of evidence that the crew ever complained of any defect in the vessel or its machinery, or that they ever had apprehension for their safety. . . .

In short, the reason for allowing seamen to refuse to serve to the port of destination is reasonable apprehension of danger to themselves from unseaworthiness of the ship at the time. There was never any claim of apprehension of danger or charge that the vessel was unseaworthy.

268 Fed. 15, 21-22 (C.C.A. 4th, 1920).

Illness or
injury

In decisions of February 12 and April 9, 1926, the Comptroller General said that the discharge of ill or injured seamen under section 4581 of the Revised Statutes (46 U.S.C. § 683) has, as its only practical effect, the relieving of the owners or operators of a vessel of liability for future wages.

5 Comp. Gen. 623, 814.

A seaman on a voyage from San Francisco to Manila and return; who was injured not in the service of the vessel and hospitalized at Honolulu and who then returned to the United States, was allowed wages to the end of the voyage, except for the period when he was incapacitated, the court pointing out that he had not been discharged.

Meyer v. Dollar S.S. Line, 43 F. (2d) 425 (W.D. Wash., 1930); affirmed, 49 F. (2d) 1002 (C.C.A. 9th, 1931).

It was held in 1925 that a seaman who is injured or falls ill in the service of the vessel is entitled to his wages to the end of the voyage, irrespective of whether or not he was discharged. *Enochsson v. Freeport Sulphur Co. et al.*, 7 F. (2d) 674 (S.D. Tex., 1925). See also *Haltvorsen v. United States*, 284 Fed. 285 (W.D. Wash., 1922); *Pacific Mail S.S. Co. v. Lucas*, 264 Fed. 938 (C.C.A. 9th, 1920), affirmed, 258 U.S. 266 (1922).

As to discharge of seamen for injury or illness, see 46 U.S.C. §§ 682 and 683. See also *post* §458.

Replying to an inquiry as to the correctness of the procedures being followed by several consular officers in discharging seamen, the Department of State, in 1926, said:

... Consular officers are charged by law with the duty of determining the propriety of discharging seamen at foreign ports in the light of the facts ascertained by them and the relevant laws.

... the Department is of the opinion that a consular officer may and should ordinarily discharge upon request a seaman who is incapacitated for duty by reason of injury or illness resulting directly from his own gross negligence or willful misconduct. On the other hand, a consular officer might properly refuse to discharge a seaman who is incapacitated for duty by reason of illness or injury incurred in the service of the ship. In the latter case it is the Department's opinion that discharge should be based in part upon the consent of the seaman and satisfactory provision for his care, cure and repatriation, and that in the absence of these the Consul should ordinarily refuse to discharge the seaman.

In conclusion it may be explained that relatively few cases in which seamen are discharged abroad by Consuls come to the Department's attention for consideration of the circumstances and propriety of discharge. It is, therefore, not prepared to state that the practice of all American Consuls invariably accords with the views stated above.

The Assistant Secretary of State (Carr) to the United States Shipping Board, June 4, 1926, MS. Department of State, file 196.4/638.

"Inasmuch as R.S. 4580 specifies that a consular officer is authorized by statute to discharge a seaman, upon his own application or upon that of the master, if it appears to such officer that the seaman has completed his shipping agreement, or is entitled to his discharge under any act of Congress or according to the general principles or usages of maritime law as recognized in the United States, the consular officer has authority to apply these principles when considering requests for the discharge of seamen,—particularly when supported by the majority opinion of the courts,—even though their application may in certain instances appear at variance with the statute pertinent to the particular case.

"Should a consular officer decide that an ill or injured seaman is entitled to his discharge, it is suggested that the possible objection of the seaman to his discharge may be overcome by an endorsement on the certificate of discharge attached to the shipping articles and the crew list

to the effect that such discharge is without prejudice to any rights the seaman may claim to wages to the termination of the voyage upon determination by the competent authorities or courts."

The Department of State to the Consul General at Hong Kong (Jenkins), July 3, 1933, MS. Department of State, file 196.6/1185.

"While the procedure indicated by Section 240 of the Consular Regulations should be followed wherever practicable, it may be stated that although Section 4581 of the Revised Statutes, providing for the discharge of seamen on account of illness or injury, is not specific on the question raised by the Consul General, it doubtless is the intention that when seamen are incapacitated for service they may be discharged before the consul provided he is satisfied that such discharge is justified, even though the seaman is not present to give his consent, or refuses to give such consent." The Department of State to the Consul General at Copenhagen (Dreyfus), June 6, 1932, MS. Department of State, file 196.4/712. To similar effect, see the Consul General at Buenos Aires (Robertson) to the Secretary of State (Lansing), no. 359, Nov. 13, 1916, and the Director of the Consular Service (Carr) to Mr. Robertson, no. 188, Dec. 23, 1916, *ibid.* 196.4/121. A like inquiry in 1921 was referred to the Department of Commerce, which rendered a similar ruling. The Assistant Secretary of Commerce to the Secretary of State (Hughes), Jan. 5, 1922, *ibid.* 196.4/537.

It was provided in the Consular Regulations of the United States, section XIII (Ex. Or., Oct. 16, 1937, 2 F.R. 2237, 2239-2240) that—

Discharge
without
seaman's
consent

204. *Discharge without consent of seamen.* It is the general policy of the laws of the United States to discountenance the discharge of seamen in a foreign port. (Fed. Cas. 5244, 10262.)

When the application for the discharge of a seaman is made by the master, it is the duty of the consular officer to inquire carefully into the facts and circumstances, and to satisfy himself that good and substantial reasons exist for a discharge before granting the application. (59 Fed. Rep. 790; 299 Fed. Rep. 977.)

A seaman is not to be discharged for slight or venial offenses, nor for a single offense, unless of a very aggravated character. If the seaman is charged with insubordination, it should satisfactorily appear that he is incorrigibly disobedient and will not submit to his duty, and that he persists in such conduct. Gross dishonesty, habitual drunkenness, and a disposition to instigate broils and quarrels to the destruction of the discipline of the crew have been held to be sufficient ground for discharge. But it is otherwise if the offense is temporary, and if the offender is repentant and is willing to change his conduct and return to duty. (Fed. Cas. 3234, 6955; 22 Fed. Rep. 927; 36 Fed. Rep. 442.)

205. *Discharge for misconduct or incompetence.* Generally, the grounds on which a seaman may be discharged, when insubordination or bad conduct is alleged, are such as amount to a disqualification and show him to be an unsafe or unfit man to

have on board a vessel. (Fed. Cas. 13117.) The consular officer must be satisfied that the officer or seaman is incompetent to perform the work he has contracted to do, or that he has been guilty of such acts of insubordination as to make him dangerous to a man of ordinary firmness, or that his habitual misconduct (such as drunkenness, for instance) amounts to unfitness for duty, or, if an officer, that he has been guilty of habitual cruelty. Except for good reasons and in extraordinary circumstances, seamen should not be discharged at a foreign port when the vessel is homeward bound.

In a case where an officer on an American vessel had threatened the life of the master it appeared that the consul was well within his rights in discharging him. The Director of the Consular Service (Carr) to the Ocean Marine Engineers' Beneficial Association, Feb. 9, 1920, MS. Department of State, file 196.3/275.

In reply to a report from the American Consul at Marseille in 1938 concerning a shooting affray on board an American vessel, in which one of the crew members had threatened the lives of other crew members, the Department of State instructed the Consul that if he was satisfied that this individual was guilty of gross misconduct and likely to be dangerous and destructive of discipline he had authority under the Consular Regulations to discharge him. Consul General Hurley to Secretary Hull, telegram of Apr. 14, 1938, and Mr. Hull to Mr. Hurley, telegram of Apr. 15, 1938, MS. Department of State, file 196.32/632.

With regard to a request that an American Consul testify by deposition in an action brought by a seaman against a shipping company on account of alleged unjustifiable discharge, the Department of State instructed the Consul that in such a case—

where it appears that it is not stated on the face of the complaint that the seaman was discharged by a consular officer, it is impossible to raise the point of lack of jurisdiction by demurrer, and, therefore, the defendant must answer the complaint and prepare for trial. In this situation the defendant seems to be entitled to the testimony of the consular officer who discharged the plaintiff. There may also be other reasons why in such cases the evidence of the consular officer would be essential to the defendant in maintaining his position before the courts, and it is, therefore, considered that when so requested consular officers should execute depositions in such cases, and forward them through the Department so that if no objection appears they can be transmitted to the appropriate court.

The Director of the Consular Service (Carr) to the Consul at Kobe, Japan (Caldwell), Jan. 24, 1921, MS. Department of State, file 196.32/140.

In 1922 certain seamen from an American vessel were discharged before the American Vice Consul in Hong Kong on the complaint of the master that they had refused to work cargo on Sunday, the vessel not being in a safe harbor. The seamen later sued the vessel for full wages through the end of the voyage. The court dis-

cussed sections 4580 and 4581 of the Revised Statutes (46 U.S.C. §§ 682 and 683) and held that "A single willful disobedience of a lawful command, at least one no more aggravated than that in the present case, would not warrant, without his consent, the discharge of a seaman before the termination of the voyage." The court also found that it had jurisdiction to review the ruling of the Consul. An award was made to the seamen for their expenses while waiting for employment at Hong Kong, for one month's extra wages less four days' wages forfeited because of disobedience to the master's lawful command (46 U.S.C. § 701), and for transportation from Hong Kong to Seattle.

The Donna Lane, Hansen et al. v. Donna Lane Motor Ship Corporation, 299 Fed. 977, 982 (W.D. Wash., 1924).

The chief engineer of an American vessel, who was discharged before an American Consul in a foreign port on charges of negligence and incompetency, later brought an action in the nature of malicious prosecution against the owners. The court said in part :

... Incompetence to perform the duties of an important position in which he has shipped, and which for the safety of the vessel must be capably filled, would also justify his discharge abroad. These are questions for the master to decide; he is the one who makes the discharge. The consul does not "cause" a seaman to be discharged, as the declaration alleges, in a case like the present. It is evidently based upon a misunderstanding of the law. When a master discharges a seaman in a foreign port, in order to protect himself under R.S. §4576, *supra*, he must secure the consent of the consul to his action. It has been held that the consul's action is not binding on either party, and will not avail the master, where consent to the discharge was obtained by his own deceit or collusion. *Mattes v. Standard Transp. Co.*, *supra*; *Tingle v. Tucker*, Fed. Cas. No. 14,057. It has also been held that the consul's action will be regarded as *prima facie* correct, and will be followed, unless there is persuasive evidence to the contrary. *The T. F. Oakes* (C.C.) 36 F. 442, 445; *Latty v. Emergency Fleet Corporation* (D.C.) 279 F. 752.

The *Pocahontas* was on a foreign voyage, and the proceeding before the consul referred to in the declaration was apparently based on R.S. §4576, being an application to him for his consent to the discharge of the plaintiff. I think it extremely doubtful whether it constituted a judicial proceeding of such character as to lay the necessary foundation for an action of malicious prosecution.

McAvey v. Emergency Fleet Corporation, 15 F. (2d) 405, 407 (D. Mass., 1926).

It is clear that the willful misconduct involved in the instant matter [seaman had been drunk and incapacitated for duty during a period when his services were needed and had ulti-

mately been hospitalized for alcoholism] was not such an offense as is shown to have specifically breached the shipping articles signed by the seaman or of such a nature as would *ipso facto* terminate the relationship between the shipping company and the seaman and, therefore, that the action of the consul in refusing to discharge the seaman in question until the owner of the vessel agreed to assume the responsibility for the return of the seaman to the United States was correct.

The Comptroller General (McCarl) to the Secretary of State (Kellogg), Feb. 2, 1927, no. A-12486, MS. Department of State, file 196.4/642.

"In cases where illness or injury are not involved, the authority of the consular officer to impose any particular conditions or to refuse to discharge the seaman is not as well established. Nevertheless, the policy of the Department is to discourage the discharge of seamen in foreign ports; and the practice of your office in requiring the master to produce a landing certificate from the local police would appear to be reasonable." The Assistant Secretary of State (Wright) to the Consul General at Calcutta (Lay), Aug. 19, 1926, MS. Department of State, file 196.7/2271.

The Consular Regulations of the United States, section 243 (Feb. 1931), were amended by Executive order of January 29, 1937 (2 F.R. 221) to read: Collection of wages

... If any consular officer, when discharging any seaman, shall neglect to require the payment of and collect the arrears of wages and extra wages required to be paid in the case of the discharge of any seaman, he shall be accountable to the United States for the full amount thereof.—*R.S., Sec. 4581, amended; 30 Stat. L., 759.* Consular officers are required by law to collect one month's extra wages in the following cases, and are prohibited from so doing in any other case.

(a) *General*.—Whenever a seaman is discharged by a consular officer, the master shall provide such seaman so discharged with employment on a vessel agreed to by the seaman, or shall provide him with one month's extra wages, if it shall be shown to the satisfaction of the consular officer that such seaman was not discharged on account of neglect of duty, incompetency, voluntary consent, or injury incurred on the vessel. (46 U.S.C. §683.)

(b) *Voyage contrary to agreement, vessel unseaworthy or badly provisioned, or cruel treatment.* ... (46 U.S.C. §685.)

(c) *Vessels sent to sea unsuitably provided.* ... (46 U.S.C. §658.)

(d) *Improper discharge within a month*.—See section 232 (46 U.S.C. §594).

(e) With regard to the extra wages of seaman shipped "by the lay", see section 244, and of seamen shipped on undocumented vessels, section 245.

With reference to the inquiry of a consular officer as to his responsibility for the wages of seamen discharged from American fishing vessels in a case where it was impossible to substantiate the amount

due because of the absence of documentary evidence of the commencement of a seaman's engagement and of the terms thereof, the Department of State, in March 1931, said:

While it has been held by the court in the case of the *T. F. Oakes* (36 Fed. Rep. 442), that the consular certificate of discharge of a seaman is only *prima facie* evidence of the material facts stated therein, it is believed to be unlikely that a consular officer would be held accountable by the courts for the payment of additional wages which might subsequently be found to be due a seaman, particularly where the consul had complied in so far as possible with the provisions of the Consular Regulations, . . . and where the master and seaman had signed a consular discharge certificate giving their assent to the particulars thereof. For the further protection of the consul, however, he may in cases of the nature under consideration, require the master to execute in his presence a form of oath attesting to the terms and particulars of the seaman's employment. (See Form No. 75).

Reference was also made to a decision of the Comptroller of the Treasury (vol. 7, p. 249), which held in part that, in the absence of evidence of mistake, the action of a consular officer in determining the amount of wages to be collected by the discharged seaman will be accepted by the accounting officers in the settlement of his accounts.

The Department of State to the Consul General at Halifax (Lee), Mar. 23, 1931, MS. Department of State, file 196.4/703.

**Extra
wages**

Title 46 of the United States Code, §685 (Rev. Stat., sec. 4583), provides that "Whenever on the discharge of a seaman in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is badly provisioned or unseaworthy, or against the officers for cruel treatment, it shall be the duty of the consul or consular agent to institute a proper inquiry into the matter, and, upon his being satisfied of the truth and justice of such complaint, he shall require the master to pay to such seaman one month's wages over and above the wages due at the time of discharge" and adequate employment or transportation home. The United States Supreme Court in a decision in 1935 said with reference to this provision that—

it is plain that by its provisions the Consul or Consular Agent is made the arbiter of the seaman's demand for the month's extra wages and for other relief which it affords, and that his favorable action upon the demand and his discharge of the seaman are prerequisite to any recovery under it. As in the present case the Consul refused to give petitioner his discharge and to

certify that he was entitled to the relief demanded, his recovery under that section was rightly denied by the courts below.

McCrea v. United States, 294 U.S. 23, 28 (1935), affirming 70 F. (2d) 632, 635 (C.C.A. 2d, 1934). See also *ante*, pp. 892-893.

Title 46 of the United States Code, §597, provides:

Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: *Provided*, Such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry.

Wages in
foreign port

It was held in *Strathearn Steamship Company, Limited v. Dillon*, 252 U.S. 348 (1920), that it was not necessary under the statute for a vessel to be in port five days before a seaman could demand one half of the wages then earned. To similar effect, see the Acting Secretary of Commerce to the Secretary of State (Hughes), Oct. 26, 1922, MS. Department of State, file 196.6/870.

The above statutory provision was construed in 1921 by the District Court of the United States for the Southern District of New York to mean that the seaman is entitled to one half of the balance obtained by deducting the amount of previous advances from the total amount earned since the date of shipment. *Low Ling Sing et al. v. Standard Transp. Co., Limited*, 274 Fed. 1017 (S.D.N.Y., 1921).

References to earlier decisions are contained in this case, a summary of which was incorporated as note 1 to section 230 of the Consular Regulations of the United States (Feb. 1931). For departmental rulings to the same effect, see the Director of the Consular Service (Carr) to the Consul in charge at Hamburg (Huddle), Aug. 28, 1922, MS. Department of State, file 196.6/856; and the Assistant Secretary of State (Carr) to the Consul General at Valparaiso (Deichman), Dec. 3, 1927, *ibid.* 196.6/1050; the Department of State to the Consul General at Buenos Aires (Lay), Mar. 3, 1928, *ibid.* 196.6/1062.

With reference to a question as to whether an open roadstead where vessels discharge cargo into surfboats is a port within the meaning of the above statute, the Department of Commerce in 1922 held in the negative. The Acting Secretary of Commerce to the Secretary of State (Hughes), Oct. 26, 1922, MS. Department of State, file 196.6/870.

As to question of breach of articles as a result of refusal to accede to demand for half wages, see *ante*, pp. 891-893.

Title 46 of the United States Code, §593, provides:

In cases where the service of any seaman terminates before the period contemplated in the agreement, by reason of the loss or wreck of the vessel, such seaman shall be entitled to wages

Loss of
vessel

for the time of service prior to such termination, but not for any further period.

See *The Quaker City, Sigby, et al. v. United States, et al.*, 290 Fed. 409 (D. Md., 1923).

American seamen rescued from an American vessel which had been sunk by a submarine were held not to be entitled to extra wages. The Secretary of State (Lansing) to the Consul at Marseille (Gaulin), telegram of Apr. 13, 1917, MS. Department of State, file 196.6/137.

A vessel captured as prize was held to come within §593 of title 46 of the United States Code quoted above, and seamen thereon were denied wages after the loss of the vessel. *The Edna*, 291 Fed. 379, 380 (N.D. Calif., 1923).

Ship's papers

The Foreign Service Regulations of the United States provide that the "consular officer shall return the ship's papers to the master of the vessel", provided the master has first fulfilled the following conditions:

(1) Produced a clearance of the vessel issued by the proper officer in the port.

(2) Complied with the provisions of law relating to the discharge of seamen.

(3) Paid to the consular officer arrears in wages and extra wages due for every seaman discharged at the port, and such fees and demands as are collectible under the law and these Regulations. (22 U.S.C. §88; 46 U.S.C. §354.)

They further provide that in the event that the master of a vessel departs from a foreign seaport, leaving the ship's papers in the possession of a consular officer, the officer shall immediately transmit the papers to the Department of State.

For. Ser. Reg. U.S. XVII-1, n. 5(c) and (f), June 1941.

"There is no doubt that paragraph 180 of Consular Regulations gives full authority to a consular officer to withhold ship's papers until the law relating to discharge of seamen has been complied with, but it is the opinion of the Department that such procedure should be followed only in extreme cases." The Director of the Consular Service (Carr) to Consul General Robertson, no. 687, May 3, 1920, MS. Department of State, file 196.2/385.

"Inasmuch as consular officers are personally responsible to the Government when they neglect to require the payment of and collect the arrears of wages and extra wages in the case of a discharged seaman, the authority mentioned in the above mentioned paragraph [withholding of ship's papers] should be exercised when masters endeavor to evade the law."

The Director of the Consular Service (Carr) to the Consul at Rotterdam (Anderson), Jan. 3, 1921, MS. Department of State, file 196.4/433.

In 1924 it was reported to the Department of State that an American Consul was withholding the documents of an American vessel on account of the refusal by the master to deposit with the Consul the wages and extra wages held to be due a seaman discharged by the Consul. The Department suggested that he might deliver the documents provided the master made the required deposit of wages under protest, subject to the conditions of paragraph 253 of the Consular Regulations, which provided for such pay-

ment in doubtful cases and for a full report to the Department for its decision. The Secretary of State (Hughes) to the Consul at Guadeloupe, Fr.W.I. (Strother), telegram of Jan. 25, 1924, MS. Department of State, file 196.3/494.

" . . . the Department is not aware of any authority of law for the use of force by a consular officer in preventing a vessel from sailing. The only provisions provided by law to prevent a vessel from sailing are the withholding of the ship's papers and in extreme cases the master may be removed. When a ship's papers are withheld, consular officers should of course refuse to issue a bill of health which would result in a heavy fine being imposed on the master of the vessel." The Director of the Consular Service (Carr) to the Consul at Port-au-Prince (Terres), Sept. 25, 1920, MS. Department of State, file 196.33/21.

In 1920 an American Consul in France reported that the master of a Greek steamer had discharged certain American seamen in France, refusing to pay their return passage to the United States in accordance with the alleged shipping agreement, and that the seamen had consulted him regarding the libeling of the vessel. The Department instructed him— Libel against vessel

in no case should you attempt to libel or hold a steamer or any vessel flying a foreign flag merely at the request of seamen, regardless of what the charge may be. In cases of this kind, a thorough investigation should be made by you and the facts reported to the Department. . . .

In this connection your attention is called to that degree of precaution which you should exercise when seamen themselves employ counsel to institute libel proceedings against a vessel. While the regulations regard the Consul as an adviser and counsel of the seamen involved and enjoins upon him the duty to see that the seamen are unrestricted in the presentation of their claims, care should be taken that the manner in which the assistance is given does not make the consular officer personally liable for the fees and expenses incurred in bringing the case before the proper tribunal or court.

The Director of the Consular Service (Carr) to the Consul at Cette, France (Lespinasse), no. 2, Jan. 29, 1920, MS. Department of State, file 196.4/290.

OFFENSES

§449

It was provided in the Consular Regulations of the United States, section 294, February 1931, that—

. . . Desertion is defined to be the quitting of the ship and her service by one of the ship's company without leave and against the obligation of the party and with an intent not again to return to the ship's duty. Neglect or refusal to rejoin the Desertion

ship after an absence with leave when ordered to return is desertion; but it is not desertion when a mariner, through excess of indulgence, overstays his time of leave, and when he has not refused or neglected to comply with an order to return; nor when the seaman leaves the ship on account of cruel or oppressive treatment, or for want of sufficient provisions in port when they can be procured by the master, or when the voyage is altered in the articles without consent.—*18 Fed. Rep.*, 605; *39 Id.*, 624. Where a seaman signs articles for a voyage, agreeing to go to the port where the vessel is lying to join her, and fails to do so, he is a deserter.—*53 Fed. Rep.*, 551.

NOTE 1. *Certification of desertions by consular officers.* Consular officers should exercise care in the interpretation of the law and regulations defining desertion from American merchant ships, and should not be inclined to consider seamen as deserters who are absent without leave or who overstay their leave without any intent on the part of such seamen to sever connection with their respective vessels. . . . When a seaman overstays his time of leave, he is of course absent without leave and, therefore, if he has the intent of abandoning his vessel, he may be considered a deserter. On the other hand, a seaman who is absent without leave can not be considered a deserter unless he has the intent of not again returning to the ship's duty. The statutes of the United States provide penalties for absence without leave and for desertion, and consular officers should be careful that the proper penalty is imposed in each case.

Upon request of the master, a consular officer may acknowledge his declaration (Form No. 33) that a seaman has deserted, if the officer feels reasonably certain, after investigation, that the seaman has absented himself from the vessel with the intent of not again returning thereto. If it is ascertained subsequently by the consular officer that the seaman was not a deserter, the Department should be informed at once of the circumstances and of the first port in the United States at which the vessel will arrive, in order that proper steps may be taken to have the penalty changed to correspond with the actual offense.

To similar effect, see the Director of the Consular Service (Carr) to the United States Shipping Board, Nov. 22, 1919, MS. Department of State, file 196.3/252.

The following correspondence contains rulings to the effect that the question whether or not a seaman has deserted depends upon his intention: The Acting Secretary of Commerce (Sweet) to the Secretary of State (Lansing), Oct. 31, 1919, MS. Department of State, file 196.5/78; Mr. Sweet to the Secretary of State (Colby), Aug. 11, 1920, *ibid.* 196.5/104; Mr. Sweet to Mr. Colby, Aug. 11, 1920, and the Director of the Consular Service (Carr) to the Consul at Southampton (Savage), Aug. 18, 1920, *ibid.* 196.5/105; the Acting Secretary of Commerce (Rogers) to Mr. Colby, Sept. 18, 1920, *ibid.* 196.5/106; the Secretary of State (Hughes) to the Ambassador in Argentina (Stimson), telegram 65, May 19, 1921, *ibid.* 196.32/251; the Assistant Secretary of Commerce to Mr. Hughes, Jan. 23, 1922, *ibid.* 196.5/160; Standard Transportation Company to the Secretary of State (Stimson), Oct. 17, 1929,

ibid. 196.5/261; the Consul in charge at Yokohama (Young) to Mr. Stimson, no. 517, Nov. 20, 1929, and the Assistant Secretary of State (Carr) to Standard Transportation Company, Dec. 12, 1929, *ibid.* 196.5/263; 8 Comp. Gen. 211.

In an action for wages brought by a seaman against an American vessel it appeared that the seaman had left the vessel in a foreign port against the orders of the master when the vessel was in danger and that the master had thereafter deposited with the American Consul the sum then due the seaman as wages. The court held in favor of the vessel:

"The deposit with the American consul by the master of the wages due would not constitute a waiver of the desertion, because there was no disposition or intent of the seaman to return; on the contrary, his absence was willful. The willingness on the part of the master to have the seaman return would not be a waiver of the continued willful absence of the seaman. The master had a right to deduct from the wages due the fines and penalties imposed for willful misconduct on the part of the seaman. While consent and agreement to receive the seaman is a waiver of the desertion (*Whitton v. The Commerce*, Fed. Cas. 17,604), the willingness to have him return did not mitigate [*mitigate*] against the master on the continued willful absence, and relieve the seaman from the continued desertion." *The Levi W. Os-trander*, 291 Fed. 908, 910 (W.D. Wash., 1921).

In 1929 the American Consul General at Hong Kong transmitted to the Department of State copies of correspondence with the agent of an American steamship company in which he rejected the claim of the company to have classed as deserters seamen leaving the vessel contrary to regulations of the United States Public Health Service and whom the company claimed the vessel was unable to take back on board without being subject to quarantine under these regulations. The Department expressed the opinion that "while his [the Consul's] ruling may work some hardship on the owners of the vessel, due to the exceptional circumstances, it would be prudent nevertheless to adhere to the present practice of regarding such cases as not coming within the definition of desertion—at least until the issuance of a court decision which would justify a contrary finding by consular officers". Consul General Tredwell to Secretary Stimson, no. 954, with enclosures, Nov. 8, 1929, and the Department of State to Mr. Tredwell, Jan. 2, 1930, MS. Department of State, file 196.5 President Hayes.

"It is the opinion of this Department that if the Consul is satisfied that this vessel was in a condition to warrant her proceeding to a port where repairs could be made, it was the business of the crew to proceed with her and a refusal to do so would amount to desertion. If the vessel is not in a condition to proceed and there is a probability of an indefinite stay of the vessel at Tahiti undoubtedly the crew is entitled to discharge and their return to the United States." The Assistant Secretary of Commerce to the Secretary of State (Hughes), May 13, 1921, MS. Department of State, file 196.32/243.

In a decision of July 21, 1922 the Comptroller General held:

"The United States Consular Regulations, paragraphs 249 and 250, provide that a foreigner forfeits his rights and status as an American seaman by deserting from an American vessel abroad for cause other than cruel or unusual treatment and that he terminates such status by shipping on a foreign vessel; but a discharge for cause, even though followed by trial, conviction, and incarceration, is not tantamount to a voluntary desertion." 2 Comp. Gen. 32, 33.

**Proof of
desertion**

The primary requirements to prove desertion, in accordance with decisions of the Comptroller General (8 Comp. Gen., 194; 4 id., 390), are, first, evidence that the seaman was reported to a consular officer as a deserter within forty-eight hours after the desertion occurred and, second, the production of a certificate of desertion (Form No. 33) issued by the consular officer.

The Assistant Secretary of State (Carr) to the Consul in charge at Hamburg (Smith), Mar. 29, 1930, MS. Department of State, file 196.5/265.

. . . in case the desertion takes place at a port where there is no American consular officer, the master of the vessel should report the desertion to the American consular officer at the first port at which the vessel calls, if it calls at a port where there is an American consular officer subsequent to the desertion. In case the vessel does not call at a port at which there is an American consular officer, the master should report the desertion to the proper officer in the United States upon his arrival in a port of the United States.

The Director of the Consular Service of the Department of State (Carr) to the Theodore Dunn Transportation Company, May 27, 1921, MS. Department of State, file 196.5/135.

In regard to your request for instructions with regard to notifications of desertions received by radio from the masters of vessels, the Department believes that you are entirely justified in taking the attitude that such notifications are not sufficient to establish desertion. It would appear from Section 300 of the regulations that a desertion must be noted on the crew list and officially authenticated by a consular officer. In any event, the consular officer concerned must determine that there is sufficient evidence to establish desertion before proceeding on this basis.

The Assistant Secretary of State (Messersmith) to the Consul General at Casablanca (Goold), July 11, 1939, MS. Department of State, file 196.5/342. The relief of destitute seamen who have deserted is treated *post*, pp. 933-935.

In 1934 the Department of State replied as follows to an inquiry concerning the policy it would adopt upon the occasion of a strike by a group of seamen in a foreign port:

In event of a strike by seamen endangering or delaying a vessel of the United States in a foreign port, the American consul at such port would doubtless be guided by the provisions of the United States Code, Title 18, Section 483, and the pertinent sections of the Consular Regulations of the United States based thereon and which prescribe the action to be taken in such circumstances.

Mutiny

Briefly it may be stated that if seamen on board a vessel of the United States either arrive at a port in a state of mutiny, or a mutiny occurs in port which cannot be quelled by the captain, and the captain cannot navigate his ship to the United States with the mutineers on board, the consular officer should, if the

laws of the country permit, cause the mutineers to be confined and sent home for trial, unless for sufficient cause, such as unjustifiable cruelty on the part of the captain, the ends of justice will be best subserved by discharging them. In the latter case the consul is required to report at length the reasons for his course of action.

As of possible interest, your attention is invited to a decision of the United States Court of Appeals, Fourth Circuit, July 6, 1920 (*Hamilton v. United States*; 268 Fed., 15) . . .

Your attention is also invited to the United States Code, Title 46, Section 701.

The president of the American Radio Telegraphists Association (Haddock) to the Secretary of State (Hull), Oct. 22, 1934, and the Assistant Secretary of State (Carr) to Mr. Haddock, Nov. 1, 1934, MS. Department of State, file 196.32/528.

In the case of *Hamilton et al. v. United States*, referred to *ante*, pp. 889, 894, the Circuit Court of Appeals for the Fourth Circuit, in affirming the conviction of certain seamen for "endeavoring and conspiring to make a revolt as merchant seamen", said:

"The specific question is whether the agreement of the entire crew of the ship, anchored in a port of refuge before the end of the voyage, to refuse to obey the orders of the master, and their united action in carrying out the agreement, while remaining on board, is endeavoring to make a revolt. This was not usurpation of the command from the master, for there was no effort to take charge of the ship. But evidently it was a successful endeavor to deprive him of authority and command on board, and to resist and prevent him in the free and lawful exercise of his command. The united action of a crew in refusing to yield obedience to the lawful command of the master deprives him of the authority and command he was in duty bound to exercise. This is as much resistance and prevention of the free and lawful exercise of his authority and command as an undertaking by a crew to deprive him of any inanimate instrumentality necessary to the command and management of the ship. A master may have possession of the ship alone, but he cannot be in command of it, if the crew unite in refusing to carry out his orders. . . . Command of a ship means actual control of the crew for nautical purposes."

268 Fed. 15, 18-19 (C.C.A. 4th, 1920). See also Consular Reg. U.S. sec. 351, n., May 1930.

See also *United States v. Albers et al.*, 115 F. (2d) 833 (C.C.A. 2d, 1940) and *ante*, pp. 891-893, which the court said was almost exactly parallel to *Hamilton v. United States*.

"... the admiralty and maritime jurisdiction of the United States extends not only to vessels on the high seas but also to those on navigable waters within the territorial jurisdiction of a foreign sovereign. *Genesee Chief v. Fitzhugh*, 12 How. 443; *The Eagle*, 8 Wall. 15; *United States v. Flores*, 289 U.S. 137. Therefore, when a mutiny occurs on a vessel of American registry in a foreign port the vessel is 'within the admiralty and maritime jurisdiction of the United States' within the meaning of Section 433, Title 18, U.S.C." The Consul at Bombay (Waterman) to the Secretary of State (Hull), no. 319, Dec. 7, 1936, MS. Department of State, file 196.32/548; the Acting Attorney General (Reed) to Mr. Hull, Feb. 9, 1937, *ibid.* 196.32/549.

Sit-down
strike

It was reported to the Department of State, in September 1937, that a sit-down strike had occurred on board the United States government-owned steamship *Algic* while at anchor in the harbor of Montevideo, Uruguay. It appeared that the strike was sympathetic with a strike of longshoremen and that the crew, by refusing to make steam, prevented the loading of the vessel from lighters. The United States Maritime Commission, after conferring with officials of the Departments of State and Justice, transmitted the following telegram through the Department of State to the master of the vessel:

... Instruct crew to proceed with your lawful orders. If they still refuse warn crew that all still refusing to perform duty will be placed in irons and prosecuted to full extent of law on return to United States. If they still refuse place ringleaders in irons. If other crew members still refuse duty have them removed from ship and replace them with American if available and if not foreign seamen. In case you experience any difficulty, request assistance local authorities.

The Consul reported to the Department on the following day that the above instructions had been carried out, whereupon the strike had ended. Upon their return to the United States certain members of the crew of the *Algic* were prosecuted by the United States for violation of section 292 of the Criminal Code (18 U.S.C. §483, inciting revolt or mutiny on shipboard). The men were tried and convicted before a jury in the District Court of the United States for the District of Maryland and the conviction was affirmed in the Circuit Court of Appeals for the Fourth Circuit, the court discussing particularly the question whether the verdict was sustained by the evidence and whether the crew had, under the circumstances, a lawful right to strike.

The contention that the crew has a right to strike in cases where the vessel is safely moored or anchored in a harbor was raised but not decided, the court holding that this was not the situation of the *Algic*, that obedience to the master's orders was essential to her safety, and that the same rule was therefore applicable as if the vessel were at sea. But in a later case involving a strike on an American vessel safely moored in an American port the contention was again raised and this time overruled by the United States Supreme Court.

New York Times, Sept. 11, 1937; *Rees et al. v. United States*, 1937, A.M.C. (D.C. Md.) 1611, 95 F. (2d) 784, 792 (C.C.A. 4th, 1938); *Southern Steamship Company v. National Labor Relations Board et al.*, 62 Sup. Ct. 886 (1942).

In 1936 the American Consul at Bombay reported the sit-down strike of the crew of an American merchant vessel in that port. The principal complaint of the crew related to the ship's provisions, but instead of availing themselves of their right to place a complaint before the Consul they had taken matters into their own hands in an attempt to coerce the master by refusing to make steam, thus preventing the loading of the vessel. The dispute was compromised, but the Consul requested general instructions, to which the Department replied:

The Consul will appreciate that the Department may not properly issue definite instructions as to the action which should be taken in event of mutiny on an American vessel in advance of the receipt of all the facts in the particular case. Every effort should, of course, be made, as in the instant case, amicably to adjust the disputes in a reasonable and lawful manner . . . and induce the seamen to settle their differences before a shipping commissioner or proper authority in the United States. While consular discharge of seamen in a foreign port should be avoided wherever practicable, it is possible that in a particular instance threatened or incipient mutiny may be avoided or quelled by discharge of the ringleaders and the shipment of a sufficient number of seamen to enable the vessel to proceed on its voyage.

The Department also transmitted the Consul's despatch to the Department of Commerce, which replied as follows: Penalties

The only authority for confining a seaman or to place him on short rations, vested in the master, is contained in the fourth and fifth paragraphs of Section 701 [of 46 U.S.C.] . . . and that authority can be exercised only when the vessel is at sea.

It would appear, therefore, that this statute cannot be invoked under the conditions referred to by the Consulate since the vessel was in a port at that time.

Unless, therefore, the local authorities in the foreign port will intervene in the matter under local laws, it appears that there would be no immediate remedy unless the master requested the Consul to discharge the seamen.

Under the conditions as recited by the Consulate in its report, it would seem that there was a possible violation of Section 483, Title 18, United States Code (Criminal Code, Section 292), and if the master or owners so elected prosecution under that statute could be had by making formal complaint to the United States District Attorney in any judicial district having jurisdiction.

Consul Waterman to Secretary Hull, no. 280, Sept. 14, 1936, and Mr. Hull to the American consular officer in charge at Bombay, Oct. 16, 1936, MS. Department of State, file 196.32/542; the Assistant Secretary of Commerce (Johnson) to Mr. Hull, Oct. 28, 1936, *ibid.* 196.32/545.

Organized insubordination is mutiny, and is not to be condoned or tolerated. . . . It is the duty of the master to maintain effective discipline on his vessel, and he has the power (now regulated by statute) to inflict punishment for that purpose. Confinement is a recognized form of punishment. But it should ordinarily be inflicted on board the vessel; causing a seaman to be removed from his vessel and confined in the jail of a foreign tropical country is treatment which is not justified, except in extreme cases.

Latty et al. v. Emergency Fleet Corporation, 279 Fed. 752, 755 (D. Mass., 1922).

An inquiry from the American Consul General at London as to whether, in discharging seamen, he was authorized to deduct from their wages the fines imposed by masters of vessels in the enforcement of discipline was referred by the Department of State to the Department of Commerce, which replied:

Paragraph 7 of section 4511 R.S. [46 U.S.C. §564] provides that the articles shall contain any regulations as to the conduct of the seamen on board and as to fines which may be assessed against them.

Section 4604 R.S. [46 U.S.C. §706], after prescribing forfeitures from wages for desertion states that "in all other cases of forfeiture of wages the forfeiture shall be for the benefit of the master or owner by whom the wages are payable."

It is the opinion of this Department that a master of a vessel may impose fines and forfeitures on the members of his crew only in cases in which such fines and forfeitures are provided for by law or by the authority of this Department and not contrary to law, this opinion being strengthened by the fact that our laws cover practically every subject for which a seaman reasonably should be fined.

The Department of Commerce also referred to the following statutory provisions: Sections 4528, 4596, 4608, 4612, 4550, 4603, 4605, 4539, 4544, and 4610 of the Revised Statutes being, respectively, sections 595, 701, 710, 713, 642, 705, 707, 622, 627, and 711 of title 22 of the United States Code. Reference was also made to *Pacific Mail Steamship Co. v. Schmidt*, 241 U.S. 245 (1916), "where the court took cognizance of the fact that deductions from wages of a seaman might be valid where silverware under his care was missing".

In conclusion it was pointed out that "Section 4580 R.S. [46 U.S.C. § 682] provides for the discharge of seamen by Consuls while sec-

tion 4581 R.S. as amended . . . [46 U.S.C. §683] provides for the payment before him of wages."

Consul General Hollis to Secretary Lansing, telegram of Oct. 13, 1919, MS. Department of State, file 196.6/332; the Acting Secretary of Commerce (Sweet) to Mr. Lansing, Nov. 20, 1919, *ibid.* 196.6/337,

In 1916 an American vessel upon which, during 31 days on the high seas, certain officers and members of the crew had refused to perform their duties, arrived at Melbourne, Australia. After investigation, the American Consul applied section 4596 of the Revised Statutes (46 U.S.C. §701), under the fifth paragraph of which penalties were provided for "continued willful disobedience to lawful command or continued willful neglect of duty at sea", and ruled that the mate should forfeit three days' pay for one day's disobedience at sea, the second mate two and one-half days' pay for one, and the seamen two days' pay for one, and that they all should be paid off and discharged from the vessel. The Department of Commerce approved the action of the Consul.

Consul Magelssen to Secretary Lansing, no. 253, Oct. 13, 1916, MS. Department of State, file 196.32/24; the Assistant Secretary of Commerce (Sweet) to Mr. Lansing, Dec. 6, 1916, *ibid.* 196.32/28.

The statute referred to above provides for forfeiture, upon arrival in port, of not more than four days' pay for "willful disobedience to any lawful command at sea" and forfeiture of not more than twelve days' pay for every "twenty-four hours' continuance of such disobedience or neglect" of duty at sea (or alternative penalties of imprisonment "at the discretion of the court"). Title 46 of the United States Code, §595, provides that "No seaman or apprentice shall be entitled to wages for any period during which he unlawfully refuses or neglects to work when required . . ." The Department of Commerce ruled in Nov. 1918 that "where seamen refuse or neglect to work while the vessel is in port action should be taken under section 4528 of the Revised Statutes [46 U.S.C. §595], and that where such cases arise at sea the provisions of subdivisions 4 and 5 of section 4596 . . . as amended . . . [46 U.S.C. §701] should be applied". The Secretary of Commerce (Redfield) to the Secretary of State (Lansing), Nov. 25, 1918, MS. Department of State, file 196.32/34.

In 1917 an American Consul in Australia reported to the Department of State that, due to a longshoremen's strike, the master of an American vessel had called upon the crew to discharge the cargo, a duty which they were required to perform when requested by the master by an express stipulation in the articles of shipment. The crew refused to obey the order on the ground that it conflicted with their union obligations, and the vessel was thereby subjected to considerable demurrage charges. The crew later demanded 50 percent of their wages, which the master refused to pay. The matter was referred by the Department of State to the Department of Commerce, which ruled:

"1. That, as the order which the seamen refused to obey was in strict conformity with a provision in their contract which the parties thereto

were competent to make, and as the rules of the union to which the seamen belonged formed no part of their contract, the fact that if they obeyed the order they would be liable to expulsion from the union for a violation of its rules, afforded them no justification for failing to carry out the order.

"2. That where a vessel sustains demurrage charges in consequence of the crew's refusal to obey a lawful order of the master, the crew is responsible for the additional expense resulting from such insubordination, the amount of which may lawfully be deducted from their wages, each seaman contributing his pro rata share according to the monthly wages he receives.

"3. That the provision of section 4 of the Seamen's Act, giving to seamen the right to receive on demand at way ports one-half the wages they have earned, is not to be literally construed, but means that the seamen shall receive such half-wages less any prior indebtedness to the vessel lawfully incurred.

"4. That, consequently, the master was authorized, in the present case, to deduct from the one-half wages demanded by each seaman the latter's share of the demurrage charges resulting from the crew's disobedience.

"6. That the seamen were not deprived, merely because of their disobedience, of the right to their wages given by said section 4, the penalty for disobedience to lawful command being prescribed by section 4596 of the Revised Statutes."

The Consul at Sydney (Brittain) to the Secretary of State (Lansing), no. 776, Sept. 7, 1917, MS. Department of State, file 196.6/191; the Acting Secretary of Commerce (Thurman) to Mr. Lansing, Oct. 19, 1917, *ibid.*, 196.6/195.

Paragraph eight of title 46 of the United States Code, §701, provides that if a seaman is convicted of any act of smuggling, he shall be responsible to the master or owner for any loss or damage occasioned thereby and that sum shall be deducted from his wages. The illegal entry of human beings is not included within the meaning of the word *smuggling* as used in this act. The Consul General at Hong Kong (Anderson) to the Secretary of State (Lansing), no. 511, Feb. 25, 1916, MS. Department of State, file 196.6/91; the Acting Secretary of Commerce (Sweet) to Mr. Lansing, Apr. 24, 1916, *ibid.*, 196.6/95.

RELIEF

IN GENERAL

NATURE OF RELIEF

§450

It was provided in the Consular Regulations of the United States, section 259, February 1935, that—

... It is the duty of consular officers, from time to time, to provide for the seamen of the United States who may be found destitute within their districts, respectively, sufficient subsistence and passages to some port in the United States, in the most

reasonable manner, at the expense of the United States, subject to such instructions as the Secretary of State shall give.—46 U.S.C. §678 [Rev. Stat., sec. 4577]. The provisions respecting relief apply to American seamen on American or foreign built vessels purchased abroad and wholly owned by American citizens in the same manner as to seamen of regularly documented vessels.

Title 46 of the United States Code, §683 (Rev. Stat., sec. 4581, as amended by sec. 16 of the act of December 21, 1898, 30 Stat. 759), provides that whenever a seaman is discharged on account of illness or injury incapacitating him for service, the expenses of his maintenance and return to the United States shall be paid from the fund for the maintenance and transportation of destitute seamen. See *post*, §458.

Title 46 of the United States Code, §593, provides with reference to shipwrecked seamen:

Such seaman shall be considered as a destitute seaman and shall be treated and transported to port of shipment as provided in sections 678, 679 and 681.

See also *post*, §459.

The relief authorized by sections 4577 and 4581 of the Revised Statutes [46 U.S.C. §§678, 683] of the United States, when granted, is understood by this Department to include all necessary expenses such as food, shelter, clothing, medical and hospital expenses and return transportation to the United States.

What
constitutes
relief

The Assistant Secretary of State (Carr) to William Denman, May 23, 1927, MS. Department of State, file 196.7/2371.

"The subsistence or maintenance required to be furnished in these cases is such only as may be necessary pending the return of the seaman to the United States at the earliest practicable date." 2 Comp. Gen. 438, 439.

SEAMEN ENTITLED TO RELIEF

§451

... Seamen of the United States entitled to relief when destitute are:

(1) Merchant seamen who are citizens of the United States and who, at the time of applying for relief, are by habit and intent bona fide members of the American merchant marine, although their last service may not have been in an American vessel.

(2) Aliens regularly shipped in an American vessel in a port of the United States ... [E. O. Jan. 29, 1937].

Seamen considered destitute. The following classes of seamen are to be considered destitute and entitled to relief regardless of money they may have in their possession, or of wages due:

(a) American seamen, formally discharged from American vessels before a consular officer on account of injury or illness incapacitating them for service.—46 U.S.C. §683.

(b) American seamen, regardless of nationality or port of shipment, who are from lost or wrecked American vessels (except seamen on yachts).—*46 U.S.C. §593; 48 Stat. 395; E. O. Jan. 8, 1935.*

Consular Reg. U.S. sec. 260, Feb. 1935, as amended by Ex. Or. 7543, Jan. 29, 1937, 2 F.R. 222.

An American Consul General at Large reported to the Department of State in 1912 that he had advised an American consular agent that American seamen retained their status after their discharge; that in case of accident or injury they were entitled to relief; and that such status was retained until voluntary termination through shipping upon a foreign vessel, by abandoning the calling of seaman, or otherwise. The Department of State approved the opinion expressed by the Consul General. The Consul General at Large (Murphy) to the Secretary of State (Knox), no. 151, Aug. 14, 1912, and the Second Assistant Secretary of State (Adee) to Mr. Murphy, no. 174, Aug. 30, 1912, MS. Department of State, file 196.7/136.

An American seaman who had been signed on an American vessel was struck and injured by an automobile before joining the vessel. The American Consul hospitalized the seaman and discharged him, and inquired whether in the circumstances the seaman was entitled to relief. The Department replied in the affirmative. The Vice Consul at St. Michael, Azores (White), to the Secretary of State (Bryan), no. 228, Mar. 4, 1915, and the Director of the Consular Service (Carr) to Mr. White, no. 64, Mar. 18, 1915, MS. Department of State, file 196.7/286.

In an opinion of Feb. 4, 1928 the Comptroller General ruled that a person "who is habitually a seaman on American vessels but who at the time of appearing before a consular officer is attached to an American vessel as a 'work-a-way,' is entitled to be regarded as an American seaman within the meaning of the laws authorizing consular officers to furnish relief, transportation, etc., to American seamen under certain circumstances and conditions". The Comptroller General (McCarl) to the Secretary of State (Kellogg), Feb. 4, 1928, MS. Department of State, file 196.7/2408. The workaway must qualify for relief as any other seaman and is not entitled to relief merely because he is a workaway. See the Chief of the Consular Bureau (Hengstler) to Robert L. Hague, Mar. 8, 1924, *ibid.* 196.71/701; the Director of the Consular Service (Carr) to the Oriental Navigation Company, Sept. 22, 1921, *ibid.* 196.7/1475; the Assistant Secretary of State (Carr) to A. H. Bull & Company, Inc., May 2, 1925, *ibid.* 196.7/2208.

In a decision of January 16, 1923, the Comptroller General, after reviewing the statutes governing the relief of seamen, said in part:

Under these statutory provisions the only instances in which a consular officer is specifically required to make payments from United States funds on account of American seamen are when an American seaman is found destitute within his district and when an American seaman is discharged by or before him on account of injury or illness incapacitating said seaman for service.

A consular officer is not required by law to furnish relief from United States funds to a seaman who has not been discharged

unless said seaman is found destitute within the consular officer's district.

2 Comp. Gen. 438, 439-440.

Replying to an inquiry concerning relief to be afforded stranded American citizens serving as seamen on foreign vessels, the Department of State, in February 1916, said :

Americans
serving on
foreign
vessels

The shipment of an American citizen on a foreign vessel does not make him an American seaman, and he is not entitled to relief.

The Chargé d'Affaires at The Hague (Langhorne) to the Secretary of State (Lansing), telegram 514, Feb. 23, 1916, and Mr. Lansing to Mr. Langhorne, telegram 271, Feb. 24, 1916, MS. Department of State, file 196.7/381. To similar effect, see the Director of the Consular Service (Carr) to Percy S. Smallwood, May 24, 1910, *ibid.* 9441/32. See also *ante*, §446.

With reference to an inquiry by a consul as to whether he should relieve American citizens from the crew of a shipwrecked foreign vessel, the Department of State, in November 1916, said that "No funds available relief shipwrecked Americans unless they are bona fide American seamen."

The Consul at St. Michael, Azores (Bardel), to the Secretary of State (Lansing), telegram of Nov. 7, 1916, and Mr. Lansing to Mr. Bardel, telegram of Nov. 11, 1916, MS. Department of State, file 196.7/463.

The United States seems to have made an exception to the above rule in the case of vessels lost by belligerent action and in cases where the seamen were destitute and the laws of the vessel's flag did not provide for relief or wages after the loss of the vessel. The Department instructed a consul as follows in July 1917:

... "if Americans from torpedoed foreign vessels are seamen you may grant them relief from the funds available for the relief of American seamen, considering such persons as wrecked American seamen from foreign vessels." The Director of the Consular Service (Carr) to the Consul General at Lisbon (Lowrie), no. 204, July 28, 1917, MS. Department of State, file 196.7/571. To similar effect, see the Secretary of State (Lansing) to the Ambassador in France (Sharp), telegram 1435, Mar. 23, 1916, *ibid.* 196.7/386; Mr. Lansing to the Consul at Cardiff (Lathrop), telegram of May 10, 1917, *ibid.* 196.7/538; the Director of the Consular Service (Carr) to the Consul at Havre (Osborne), no. 113, Apr. 11, 1916, *ibid.* 857.857 SI 3/11.

On April 22, 1922 the Comptroller General ruled:

It is clear that an alien who ships on an American vessel in a foreign port and who is discharged in a foreign port does not come within either of the classes of seamen referred to in paragraph 260 of the Consular Regulations as entitled to relief and it has been held that such seamen are not entitled to transportation at the expense of the United States under the provisions of section 4581, Revised Statutes, as amended by the act of December 21, 1898, 30 Stat., 759. See 27 Comp. Dec., 617.

Aliens

I agree with the conclusion announced in the decision cited and therefore it must be held that the law does not require that an alien shipped on an American vessel in a foreign port and discharged in a foreign port on account of illness or injury be

furnished the same relief as is provided by law for seamen of the classes defined in paragraph 260 of the Consular Regulations. But since all seamen on American vessels may be regarded as American seamen for certain purposes an alien who ships on an American vessel in a foreign port and is discharged in a foreign port on account of illness or injury may be furnished such temporary relief and protection as you may deem necessary and proper under authority of the annual appropriation made for the relief and protection of American seamen in foreign countries.

1 Comp. Gen. 583-584. See also 2 Comp. Gen. 32; 13 Comp. Gen. 403.

In a decision of Feb. 15, 1926 the Comptroller General said:

"... The relief which was authorized in the decision of April 22, 1922, *supra*, was temporary only and it should not extend beyond the time when reshipment by the seaman could be accomplished or beyond the time necessary to make arrangements with representatives of the Norwegian Government for his care and transportation or other relief at the expense of that government." The Comptroller General (McCarl) to the Secretary of State (Kellogg), Feb. 15, 1926, MS. Department of State, file 196.7/2314.

It was provided in the Consular Regulations of the United States, section 275, n. 17, Feb. 1935, after referring to the above decisions, that:

"Accordingly, consular officers are authorized, in their discretion, to extend temporary relief but not transportation to alien seamen shipped on American vessels in a foreign port and discharged therefrom in a foreign port on account of illness or injury, under the authority of the Comptroller General's decision dated February 15, 1926, when other means for providing for the relief of such seamen are not available, subject, of course, to all other restrictions concerning the relief of sick and injured seamen."

In an opinion of July 7, 1928 the Comptroller General referred to the decision of Apr. 22, 1922, *supra*, and said:

"... An alien seaman who ships under such circumstances and who becomes stranded in a foreign port because of the libelling of the vessel on which he shipped is in the same class with regard to the furnishing of relief at the expense of the United States as an alien seaman who is discharged before an American consul because of illness or injury and may be furnished such temporary relief and protection as may be deemed necessary and proper under the authority of the annual appropriation quoted, *supra*, for the relief and protection of American seamen in foreign countries." The Comptroller General (McCarl) to the Secretary of State (Kellogg), July 7, 1928, MS. Department of State, file 196.7/2434.

In reply to an inquiry as to whether transportation may be afforded aliens shipped on American vessels in foreign ports who have been shipwrecked, the Comptroller General, in a decision of June 1, 1934, said that "the appropriations for the relief of American seamen are not available for furnishing transportation to this country or to a foreign port of seamen of alien nationality who had been shipped upon an American vessel at a foreign port." Mr. McCarl to Mr. Hull, June 1, 1934, no. A-23948, MS. Department of State, file 196.71/1146.

WAGES AND RELIEF

§452

In reply to an inquiry from an American Consul as to whether he could apply the wages of a seaman discharged for misconduct to the expense of his repatriation to the United States the Department of State, in March 1927, said that—

Wages
may not
be applied
to relief

paragraph 224 of the Consular Regulations . . . states that seamen's wages collected by consular officers must be paid to the seaman and there is no authority to apply them to his relief. Although many cases of destitution could doubtless be avoided if consular officers expended wages in behalf of seamen instead of paying the money to them, the law does not require the assumption of such a responsibility and it should not be exercised without the seaman's consent.

The Assistant Secretary of State (Carr) to the Consul at St. Michael, Azores (Doty), Mar. 23, 1927, MS. Department of State, file 196.32/508.

A question from an American Consul as to whether the medical expenses of an American seaman who had been discharged on account of illness should be deducted from his wages, which had been deposited with the Consul, was referred by the Department of State to the Department of Commerce, which replied that "Shipwrecked seamen and seamen who are discharged on account of injury or illness incapacitating them for service are entitled to relief and transportation to the United States irrespective of any question of wages. (VI Op. Comp. Treas. [1900] pp. 603-607.)" The Consul at Santiago de Cuba (Clum) to the Secretary of State (Lansing), no. 5, Dec. 3, 1918, MS. Department of State, file 196.7/721; the Acting Secretary of Commerce (Sweet) to Mr. Lansing, Feb. 5, 1919, *ibid.* 196.7/748.

RELINQUISHMENT OF RELIEF

§453

It was held by the Comptroller of the Treasury in a decision of August 19, 1920 that the right of an American seaman to maintenance "is only until such time as the seaman can be returned to the United States", and that "If the seaman elects not to return to the United States when an opportunity is offered him, his right to maintenance terminates."

XXVII Comp. Dec. 184. To similar effect, see 2 Comp. Gen. 468 (Jan. 31, 1923) and instructions from the Director of the Consular Service (Carr) to the Consul General at Shanghai (Cunningham), Nov. 2, 1921, MS. Department of State, file 196.7/1503; the Chief of the Consular Bureau (Hengstler) to the Consul General at Paris (Thackara), Sept. 10, 1923, *ibid.* 196.7/2045.

"The appropriation for relief and protection of American seamen in foreign countries is not available for expenses of subsistence and treatment in a foreign country for any period subsequent to the date on which the seaman could, with reasonable regard for his safety, be returned to a port in the United States." 2 Comp. Gen. 150 (Aug. 28, 1922).

In 1935 an American Consul reported that the regulations of a seamen's union prohibited its members left behind as stragglers from accepting repatriation from the same company as workaways. The Department referred the Consul to the above decision of Aug. 19, 1920 and added:

"From an administrative viewpoint, it is obvious that the authority of a consul administering relief must be respected and for the sake of discipline in port the relief offered must generally be accepted by the seaman. However, it is possible that for just and reasonable cause a seaman might on occasion decline proffered relief, which he would later find it necessary to accept. Under the Consular Regulations, a consul has authority to determine the kind and quality of relief offered and on what vessel the seamen shall be transported." The Consul General at Shanghai (Cunningham) to the Secretary of State (Hull), no. 10454, Nov. 25, 1935; the Department of State to Mr. Cunningham, Dec. 21, 1935, MS. Department of State, file 196.7/2753. To similar effect, see the Assistant Secretary of State (Carr) to the Consul at Kobe (Dickover), Sept. 26, 1924, *ibid.* 196.7/2155; the Secretary of State (Kellogg) to the Consul at Barcelona (Stewart), telegram of Nov. 5, 1927, *ibid.* 196.71/919.

**Abandonment
of hospital-
ization**

In the case of an American seaman who voluntarily left an American hospital where he was receiving treatment and went to Sweden as a passenger, where application was made to the American Consul for his relief as a destitute American seaman, the Comptroller General, in denying the application, said:

... There is no law giving to American seamen a right to reject hospital treatment which the United States is prepared and willing to furnish and then to claim relief at some other place at the expense of the Government.

The Comptroller General also said that—

**Travel to
foreign
country**

there is an essential difference in status between a seaman whose being destitute in a foreign country is the result of a trip taken as a passenger and one who becomes destitute in a foreign country as an incident of his calling.

6 Comp. Gen. 468, 653, 654.

**Abandon-
ment of
calling**

In 1922 an American Consul asked to be instructed as to the length of residence on land for the purpose of obtaining employment, following discharge as a seaman, that would be necessary to bar an applicant's claim to relief as a destitute seaman. The Comptroller General, whose opinion was requested, referred to the decision of June 27, 1922 (1 Comp. Gen. 760), in which it was held that "An American seaman who, after being discharged as such in a foreign country, accepts employment on land, and does not return to the sea nor apply to the consul for relief for more than a year after his discharge as a seaman, must be presumed to have abandoned his former vocation", and said:

The opinion then expressed referred to specific cases of extreme time, viz, application after engagement in other pursuits

when more than three years had elapsed. The question presents itself as one of fact, however, and does not necessarily depend upon the element of time alone. The circumstances of each case must necessarily be considered having in view the beneficial intent of the relief act. It would seem that an American seaman to be entitled to the relief provided should continue to hold himself out for service as such, and as long as he so held himself out, it was within the purpose of the act of relief to afford the aid necessary to place him where he might reenter that service. But if one of that designation enters another occupation, or does other acts which coupled with prolonged delay in applying for relief, evidence an abandonment of that service, he would seem to lose the character and status of a seafaring man and therefore not be entitled to relief within contemplation of the act.

2 Comp. Gen. 317, 318.

With reference to an inquiry as to whether American seamen from vessels engaged in illegal liquor traffic are entitled to relief when found destitute in a foreign country, the Comptroller General in a decision of November 18, 1926 said that the statutes providing for relief contemplated "that the relief authorized thereunder should be provided only to those who at the time of application for relief are by habit and intent *bona fide* members of the American merchant marine". It was said further that "The calling of seamen must be pursued legitimately—and those who pursue it for an unlawful purpose can make no claim for benefits under a statute which can have relation only to a legitimate calling." The opinion concluded that "seamen on ships engaged in illegal liquor traffic . . . do not maintain the character or status of seamen as determined by their last occupation within the meaning of the law entitling to relief".

Must be
bona fide
seamen

The Comptroller General (McCarl) to the Secretary of State (Kellogg), Nov. 18, 1926, MS. Department of State, file 196.7/2323.

The Secretary of State inquired of the Comptroller General, in 1940, as to whether an American citizen and seaman was deprived of his right to relief by virtue of the fact that the country wherein he was found destitute was within a combat zone as defined by the President of the United States by his proclamation of November 4, 1939. The proclamation was issued pursuant to the terms of the Neutrality Act approved on the same day (54 Stat. 7), by which it was made unlawful, "except under such rules and regulations as may be prescribed", for American citizens or American vessels to travel within the defined area. The Comptroller General ruled that, if the seaman was otherwise entitled under the law and Consular Regulations, "he may be furnished relief and transportation to the United

Violation
of Neutrality
Act

States as a destitute American seaman irrespective of whether he may be subject to a penalty for violation of the Neutrality Act”.

Secretary Hull to the Comptroller General, Mar. 20, 1940, MS. Department of State, file 196.7/2909; the Acting Comptroller General (Elliott) to Mr. Hull, Mar. 26, 1940, *ibid.* 196.7/2912.

Effect of
release in
shipping
articles

In 1924 an American vessel, which was to be sold in a foreign port, signed articles with a crew shipped in the United States stipulating that upon their discharge in a European port they waived their claims to transportation. In response to an inquiry from the American Consul General at Genoa, the Department of State, after receiving the views of the Department of Commerce, said that the shipping articles seemed to be valid and to annul further claim by the seamen against the company for transportation after discharge at that port but that he should, in a doubtful case, provide against possible claims for official relief or transportation. It stated further that, if individual *bona-fide* seamen should object, sections 252 and 253 of the Consular Regulations should be followed. These regulations provided for transportation or extra wages for seamen of vessels sold in foreign ports (46 U.S.C. §684) and for submission of doubtful cases to the Department of State.

The Consul General subsequently reported that he had collected from the owners of the vessel a sum of money to cover the transportation of three of the seamen to the United States and requested instructions as to the disposition of this sum. The Department instructed him as follows:

There appears to be no legal objection to the consummation of articles whereby the crew of an American vessel, signed on at an American port, agrees to be discharged at a foreign port.

It would further appear, however, that the law also does not contemplate action on the part of the owners, master or agents of a vessel which would obviously result in seamen from these vessels becoming charges upon the Government.

The Department . . . approves your action in retaining the sum of \$75, which you deem sufficient to cover the expenses of repatriating these seamen, whose condition you report had actually become one of destitution, and who otherwise would have come upon the Government for official relief.

Consul General Osborne to Secretary Hughes, telegram of Jan. 22, 1924, and Mr. Hughes to Mr. Osborne, telegram of Jan. 25, 1924, MS. Department of State, file 195.2/3152; the Chief of the Consular Bureau (Hengstler) to Mr. Osborne, Feb. 12, 1924, *ibid.* 195.2/3157; Mr. Osborne to Mr. Hughes, nos. 1223 and 1230, Feb. 11 and 15, 1924, and Mr. Hengstler to Mr. Osborne, Mar. 8, 1924, *ibid.* 196.7/2118, /2119.

A Chilean law of 1930 provided that masters of foreign vessels desiring to sign on Chilean nationals must enter into certain engagements with the seamen before Chilean officials. An American Consul in Chile, desiring to repatriate an American seaman, who was a Chilean national, on an American vessel of the same line as that on which he had shipped, was met with a demand of the Chilean authorities that compliance be made with Chilean law. The American master being without authority to enter into the required agreement, the Consul requested instructions as to the relief to be afforded the seaman. The Comptroller General held that in the circumstances no relief should be furnished.

Conflict-
ing foreign
law

10 Comp. Gen. 280.

PREREQUISITE ACTION BY CONSUL

§454

In instructing an American Consul to relieve destitute seamen coming ashore in his district, the Department of State, in 1916, said that "The Government is not of course responsible for bills incurred by seamen before a consul undertakes to care for him."

The Director of the Consular Service (Carr) to the Consul at Yarmouth, Nova Scotia (Balch), no. 17, Feb. 16, 1916, MS. Department of State, file 196.7/374.

The American Consul at Durban, Natal, reported to the Department of State in 1910 that an American seaman who had deserted from an American vessel and had shipped on a Swedish vessel had been left destitute in a foreign port and had been cared for by the Swedish Consul beyond the period allowed by the Swedish law. The request of the Swedish Legation for the reimbursement of this outlay was allowed by the Comptroller of the Treasury, who stated in part:

"There seems to be no question that the man relieved was an American seaman and desertion did not disqualify him for assistance (*Matthews v. Offley*, 3 Sum., 115, 127), nor the fact that his last service was not on an American vessel (8 Comp. Dec. 545, 548).

"... It appears to me to be a fallacious argument that a man is not destitute within the meaning of the laws and appropriations because his necessities are being supplied by others who are not required to do so. As a matter of fact this man has no means of his own and was subsequently furnished as a destitute seaman with maintenance by the American consul. In a decision of this office of April 12, 1899 (9 MS. Comp. Dec., 114), it was held that an Indian and a Canadian physician were entitled to be paid for relieving an American seaman."

Consul Cunningham to Secretary Knox, no. 156, Aug. 26, 1910, and the Director of the Consular Service (Carr) to the Comptroller of the Treasury (Tracewell), Nov. 15, 1910, MS. Department of State, file 196.7/47; Mr. Tracewell to Mr. Knox, Nov. 23, 1910, *ibid.* 196.7/66.

Certain American seamen who, after having been shipwrecked in Canada, apparently paid their own expenses of maintenance and repatria-

tion, later applied to an American Consul for reimbursement. The Comptroller General held:

"Having failed to avail themselves of the privilege of obtaining from the consular officers such relief as was authorized by law, the seamen referred to in your letter have no valid claim against the Government on account of expenses incurred by them in returning to the United States."

In a later communication with regard to this case the Comptroller General said:

"... While the United States has provided for relief to be furnished by consular officers to American seamen in foreign countries under certain circumstances, it has not undertaken to bear the expense of any and all care and treatment of destitute or shipwrecked American seamen in foreign countries. In this connection, see 6 Comp. Gen. 1." The Assistant Secretary of State (Carr) to the Comptroller General (McCarl), Dec. 15, 1926, and Mr. McCarl to the Secretary of State (Kellogg), Jan. 10 and Mar. 8, 1927, MS. Department of State, file 195.7 Waltham.

In 1926 the hospital bill of an injured American seaman, who had been placed in a hospital in Halifax by the master of a vessel, was submitted to the owners of the vessel, who refused to pay it; it was then forwarded to the Department of State by the Consul. The Comptroller General said that—

the hospital having accepted the disabled seaman on the orders of the master of the vessel, it must look to the master or the owners of the vessel for payment. 14 Comp. Dec. [570]; 15 *id.* [348]; 3 Comp. Gen. 755; 4 *id.* 247.

6 Comp. Gen. 1, 2.

In 1927 an American steamship took an ill American seaman off an American fishing schooner at sea and later placed him in a hospital in Halifax. The Consul communicated with the Department of State with regard to the hospital bill, stating that the discharge of the man had not been requested by the master of the fishing schooner. The Department referred to the decision of the Comptroller General just mentioned and stated that it knew of no "authority by which American consular officers may assume the liability for expenditures which have been voluntarily made on behalf of seaman, even though consular relief, if applied for prior to incurring such expenditures, would have been granted." The Consul General at Halifax (Robertson) to the Secretary of State (Kellogg), no. 1174, Mar. 14, 1927, and the Assistant Secretary of State (Carr) to Mr. Robertson, Mar. 28, 1927, MS. Department of State, file 196.7/2360; Mr. Carr to Mr. Robertson, Apr. 11, 1927, *ibid.* 196.7/2364.

In 1927 an American seaman who was injured while leaving a vessel in a foreign port was placed in a hospital and discharged from the vessel before the American Consul. The Department of State notified the owners that they were responsible for the maintenance and return of the seaman. The company, while denying liability, transported the seaman to the United States and also provided him with a physician and a nurse. It subsequently demanded that the United States reim-

burse it under title 46, §683, of the United States Code and, the demand having been refused, brought suit. The court did not consider the question whether the statute relieved the vessel of its duty to maintain and provide medical treatment of seamen but held that no cause of action was stated in that it was not shown that the conditions stipulated in the above section, and in §§678-680 of the same title, had been fulfilled. These conditions were stated to be that the maintenance and transportation be provided or arranged by the consul and that the company's claim for additional expenditures beyond the cost of transportation be approved by the Comptroller General (46 U.S.C. §679).

American South African Line v. United States, 57 F. (2d) 208 (S.D.N.Y., 1932); affirmed, *American South African Line, Inc. v. United States*, 82 F. (2d) 254 (C.C.A. 2d, 1932).

In a decision concerning relief of shipwrecked American seamen (see *post*, p. 946), the Acting Comptroller General denied the claim under review, saying:

"The present claim, however, is not for allowance for the reason that the requirements of section 4578, Revised Statutes, as amended by the act of May 7, 1930, 46 Stat. 261, were not met prior to the relief furnished by the owners of the wrecked vessel, in that no request was made by the Consul to furnish such transportation and other relief, no agreement was entered into between the Consul and the claimant as to the amount to be paid, and no evidence furnished that the Consul issued a destitute seaman's certificate covering the transportation so furnished. 3 Comp. Gen. 148.

"Also, the owners of a wrecked vessel voluntarily spending money for subsistence and necessities, or other relief, for the crew of a wrecked vessel are not entitled to recover such amount from the United States. *American Scantic Line v. United States*, 5 Fed. Supp. 410." The Acting Comptroller General (Elliott) to the Secretary of State (Hull), Aug. 19, 1937, MS. Department of State, file 195.7 Bessemer City. See also *American Scantic Line, Inc. v. United States*, 27 F. Supp. 271 (1938).

PRIMARY DUTY OF VESSEL

§455

In 1926 the United States Shipping Board complained to the Department of State that an American Consul had refused to discharge an American seaman who had been drunk and incapacitated for duty during a period when his services were needed, and who had ultimately been hospitalized for alcoholism. It was said that the Consul advised the seaman that he could not be compelled to accept his discharge and could remain with the vessel or be repatriated by another vessel of the same line. The Shipping Board contended that the seaman's offense constituted a breach of the contract and sufficient legal cause for dis-

charge. The Comptroller General, in an opinion of February 2, 1927, held:

. . . It has also been consistently held that while authority is granted by statute for the return of seamen to the United States at Government expense under certain circumstances, such authority does not affect the primary duty, responsibility and liability of the shipping company owning or operating the vessel on which the seaman last served, to return the seaman to the United States. 3 Comp. Gen. 148; 4 *id.* 118.

Irrespective of the seaman's conduct or disobedience of orders, there is a duty devolving upon a shipping company to return to the United States a seaman then and previously in its employ, for the cost of which the United States may not ordinarily be held liable. A reason for this is that the seamen are abroad as a result of their connection with the shipping company which is the primary agency to prevent the seamen from becoming a public charge in a foreign country. In other words under maritime custom and as a matter of public policy, the obligation of the shipping company goes farther than a mere contractual relationship with the seamen which is not terminated upon the discharge of the seamen in a foreign country. Furthermore, the return of the seaman to the United States is not primarily for his benefit but that he may be available for further service in the American Merchant Marine. Consequently, it is always the duty of the consular officer, if practicable, to return a seaman to the United States by the same ship on which the seaman last served or another available ship under the same private ownership or control, for the cost of which the company is not entitled to reimbursement from the United States. Decision of October 7, 1924, A-3621, addressed to the Chairman, U.S. Shipping Board.

The Comptroller General (McCarl) to the Secretary of State (Kellogg), Feb. 2, 1927, no. A-12486, MS. Department of State, file 196.4/642.

In the absence of evidence showing affirmatively that the owner of the vessel on which these seamen last served had been relieved of all duty, responsibility, and liability with respect to said seamen, payment to said owner, or its agents, for the return passage is not authorized.

4 Comp. Gen. 118, 120. But see, for further discussion, *post* §§458, 459, "Ill or Injured Seamen" and "Shipwrecked Seamen".

For the application of the rule to the particular matter of transportation, see, in addition to the above, 4 Comp. Gen. 252, 483, 632; 5 Comp. Gen. 623; 6 Comp. Gen. 723; 8 Comp. Gen. 211; the Comptroller General (McCarl) to the Secretary of State (Kellogg), Nov. 8, 1928, MS. Department of State, file 196.7 Koehler, Frank.

Enforcement
of vessel's
duty

The Comptroller General in a decision of September 28, 1923 said that—

when a seaman has been discharged from a hospital in which he had been placed by the master of the vessel from which discharged

on account of disability, the consular officer is authorized to furnish said seaman subsistence and transportation to a port in the United States, in the most reasonable manner, at the expense of the Government. But . . . such expenses would not be necessary and should not be incurred by the consular officer when arrangement can be made to return the seaman on a vessel of the company by which he was employed at the time of his injury or illness.

An American Consul inquired in 1924 as to the proper interpretation of the last sentence of the above-quoted decision, stating that steamship companies would invariably refuse to transport seamen injured on their vessels if their refusal would absolve them from further liability. The question was referred to the Comptroller General, who said that "when a vessel owned by the same company as is that by which the sailor was employed, is available for his transportation to the United States, such vessel should be required to furnish him with the subsistence and transportation required for his return to the United States without cost to the United States". The last-quoted statement was repeated by the Comptroller General in a decision of 1924.

The Comptroller General (McCarl) to the Secretary of State (Hughes), no. AD 7891, Sept. 28, 1923, MS. Department of State, file 196.7 Kahn, Kuzzle; Mr. McCarl to Mr. Hughes, no. A-3864, Sept. 3, 1924, *ibid.* 196.7/2162; 4 Comp. Gen. 252, 253.

The Department of State inquired of the Comptroller General as to the evidence which would be acceptable as proof that a consular officer has made a sufficient effort to arrange for the relief and repatriation of seamen discharged for illness or injury, at the expense of the vessel, before assuming the relief at the expense of the United States Government. He replied:

The mere refusal by a master of a vessel to accede to a demand by a consular officer to furnish relief to a seaman incapacitated for duty by illness or injury does not warrant relief at the expense of the United States where the facts and conditions are such that the vessel has not been relieved of legal liability or it is not shown that it was impossible to enforce the demand of the consular officer. The enforcement of such demands is of course an administrative matter. 5 Comp. Gen. 623. It would appear, however, that ample power is vested in the consular officers to enforce their demands. They might, for instance, refuse to discharge the seamen unless and until the master has placed him in the hospital and arranged for the payment of his subsistence and other expenses; or where the ship's papers have been filed with the consul as required under sections 4309 and 4310, Revised Statutes, the release of such papers might be refused pending satisfactory arrangements to furnish the necessary relief to the seamen. Such procedures are already provided for in the consular regulations.

In cases where the only question in dispute is the right of the ship to be reimbursed for the return of the seamen to this country the consular officer might issue a certificate requiring the transportation of the seamen at such compensation as the Comptroller General of the United States may find due, the claim for such compensation to be submitted to this office for direct settlement.

On October 29, 1927 the Department requested a ruling of the Comptroller General as to the accuracy of the following statement:

(3) When it is necessary for a consular officer to assume responsibility for the prompt treatment of seamen . . . and the vessel is primarily liable therefor, the consular officer is justified in refusing to discharge the seamen, in which case they can only be relieved at Government expense if destitute, and the ship's papers may be held pending satisfactory arrangements by the vessel. However, in event of the vessel's continued refusal or inability, the consular officer should exercise reasonable discretion in regard to delaying the departure of the vessel, particularly in the case of passenger vessels. (See your letter to this department dated May 9, 1927 (A-18045).)

The Comptroller General replied that, assuming that the statement related solely to the question of furnishing maintenance or medical and hospital treatment, it appeared to be in accord with the decisions of his office.

In 1928 an American Consul reported to the Department of State that he had discharged two American seamen suffering from disease incurred through their own fault and that he had extended medical treatment and maintenance to them after the masters of their respective vessels had refused to do so. The Consul's report was accompanied by medical certificates and the signed statements of the two masters refusing to care for the seamen. The account was transmitted to the Comptroller General, who, in a decision of December 5, 1928, said:

It would appear to have been in the interest of the Government and within the intent of the statutes for the consul at Dairen to have refused to permit the discharge of the seamen until the respective owners of the vessels upon which last serving had placed the seamen in a hospital and assumed the obligation for their care, treatment and return to the United States. In view of the previous decisions of this office on the matter, it is not understood why consular officers permit the discharge of seamen under such circumstances as appeared in the cases here presented, before the masters of the vessels had made suitable arrangement for the care, treatment and return of the seamen.

With reference to the above decision the Department, on February 12, 1929, instructed a consul as follows—

the Comptroller General has not, up to the present time, denied the right of any consular officer to exercise his discretion in such cases with respect to the holding of ship's papers. However, your attention is particularly directed to the statement, quoted above, that sick and injured seamen *should not be discharged* in these cases and that the relief granted by consuls should be under the authority of Section 4577 of the Revised Statutes, which is not dependent upon the discharge of the seamen, as is the case when relief is granted under the authority of Section 4581 of the Revised Statutes. There appears to be nothing to prevent a consular officer from ordering a sick or injured seaman placed in a hospital for treatment without discharge, and, if the vessel refuses to assume responsibility for the incidental expenses, the consular officer may relieve the seaman as destitute and refuse to discharge him, furnishing the master an official statement explaining the action taken, which the master may present to the proper authorities at the port of arrival of the vessel in the United States, as a means of accounting for his crew as required by Section 4576 of the Revised Statutes. The Comptroller General has held that when the vessel wrongfully refuses to assume the primary responsibility in such cases, no discharge should be granted, because the alleged wrongful refusal of the vessel renders it liable to pay the seaman's wages to the end of the voyage and in some cases vessels have been held for wages until the seaman was cured, even when the period extended beyond the termination of the voyage. The Comptroller General considers the granting of a discharge in such cases to be improper, since he regards this procedure calculated to relieve the vessel from further liability for wages after the seaman has been placed in the hospital in a foreign port. (2 Comp. Gen. 438; 5 id. 623, 815).

In a circular instruction of January 16, 1930 to consular officers the Department of State, after quoting the above decision of December 5, 1928, said:

The refusal of consular officers to discharge seamen in these circumstances, enables the granting of relief, when required by the seamen's condition, under the authority of Section 4577 of the Revised Statutes of the United States, which authorizes the relief of destitute seamen. This procedure also leaves the decision as to when the seamen's right to wages terminates and whether the penalty provided by Section 4576 of the Revised Statutes should be enforced against the masters of vessels, to the proper authorities in the United States. Accordingly, the facts in such cases should be promptly reported to the Department for reference to such authorities . . .

The Comptroller General (McCarl) to the Secretary of State (Kellogg), May 9, 1927, MS. Department of State, file 196.7/2370; 7 Comp. Gen. 363,

364; the Consul at Dairen, Manchuria (Langdon), to Mr. Kellogg, no. 33, Oct. 19, 1928, MS. Department of State, file 196.7/2453; Mr. McCarl to Mr. Kellogg, no. A-23409, Dec. 5, 1928, *ibid.* 196.7/2458; the Assistant Secretary of State (Carr) to the Consul at Casablanca, Morocco (Russell), Feb. 12, 1929, *ibid.* 196.7/2481; Mr. Carr to American consular officers, Jan. 16, 1930, *ibid.* 196.7/2517.

TRANSPORTATION

§456

In an instruction of September 14, 1921 the Department of State said:

Section 4578 of the Revised Statutes as amended . . . [46 U.S.C. §679] provides that masters of American vessels bound for ports of the United States are required to take on board and transport to the United States such destitute seamen as are offered by American consular officers. Consular officers should not, however, require masters of vessels to transport destitute seamen to the United States as workaways but should issue the usual certificate of transportation. The Steamboat Inspection Laws, which the masters of vessels state would be violated if they accepted destitute seamen, are applicable to vessels only in territorial waters of the United States and the Wireless Ship Act applies only to vessels leaving the United States and, therefore, the Department believes that you may require masters to accept destitute seamen for transportation to the United States. However, you should be careful not to load the vessel beyond the point of safety but this is a matter entirely within your discretion and not within that of the master.

The Director of the Consular Service (Carr) to the Consul General at Lisbon (Hollis), Sept. 14, 1921, MS. Department of State, file 196.71/485.

In reply to a report from the American Consul that he had been unable to return an insane American seaman by reason of the refusal of masters of American vessels to transport him, the Department of State referred to section 276 of the Consular Regulations providing that the masters of vessels "will also not be required to take an insane seaman, unless harmlessly so or in the custody of a keeper"; and expressed the opinion that "if a keeper is provided, the masters of American vessels who refuse to accept Fillyppu for transportation to the United States upon your formal request thereby render themselves liable to the penalty referred to in paragraph 277 of the Consular Regulations [46 U.S.C. §679] unless they can show that his transportation, taking into consideration his condition and the size and character of the vessel, would be likely to cause serious injury or inconvenience to the vessel, its crew or the passengers thereon". The Department said that, while it "considers that you are in the best position to make a decision in regard to the transportation of the above named seaman, it desires to remind you that charges for relief in consular accounts may be suspended when they cover periods exceeding three months . . . (O.R. 284)". The Assistant Secretary of State (Carr) to the Consul General at Valparaiso (Deichman), Sept. 18, 1926, MS. Department of State, file 196.7/2294. The Comp-

troller of the Treasury, in a decision of Nov. 5, 1920, authorized payment for the services of an attendant where necessary. XXVII Comp. Dec. 412.

An American Consul reported to the Department of State in 1917 that, in connection with returning an injured American seaman to the United States on an American vessel, he had requested the ship's surgeon to attend the seaman. The Consul recommended that the surgeon be reimbursed for the special services rendered. The Department stated that—

"when this seaman was placed on board the '*Monterey*' to be returned to the United States for a specific price, that vessel should bear all the expenses for the return of this seaman for the agreed price.

"A seaman when placed on board an American vessel for return to this country is, immediately upon his acceptance by the Captain, considered a seaman of that vessel, and is entitled to such medical aid as he may require during the voyage, at the expense of the ship. In this connection your attention is invited to paragraph No. 238 of the Consular Regulations."

The Consul at Nassau (Doty) to the Secretary of State (Lansing), no. 181, Jan. 26, 1917, and the Director of the Consular Service (Carr) to Mr. Doty, no. 77, Feb. 5, 1917, MS. Department of State, file 196.7/502.

In reply to an inquiry concerning the return of destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. § 679), the Department of State said:

Under date of November 13, 1922, the Assistant Attorney General advised the General Counsel of the Shipping Board that Section 4578 of the Revised Statutes applies to vessels whose true port of destination is an American port notwithstanding the fact that it might touch or call at intermediate foreign ports, but that this section does not apply to a vessel whose true port of destination is a foreign one, although it intends ultimately to return to the United States. Under these conditions it appears that consular officers have full authority to request masters of vessels proceeding to the United States whether direct or via foreign ports to transport destitute American seamen. You should of course, endeavor to arrange for the transportation of such seamen by vessels sailing direct if practicable.

Vessels
to be
utilized

The Consul General at Shanghai (Cunningham) to the Secretary of State (Hughes), no. 1138, Nov. 17, 1922, and the Director of the Consular Service (Carr) to Mr. Cunningham, Dec. 23, 1922, MS. Department of State, file 196.7/1923.

"Inasmuch as Paragraph 283 of the Consular Regulations provides that consular officers may contract with the masters of foreign vessels at reasonable rates for the transportation of destitute seamen when opportunities by American vessels do not offer, you are informed that you should not send destitute seamen to the United States by foreign vessels when there are American vessels available, even though you may be required to pay a considerably higher rate (within the maximum provided by law) for such transportation on the American vessel." The Director of the Consular Service (Carr) to the Consul General at Buenos Aires (Robertson), Mar. 29, 1922, MS. Department of State, file 196.71/519.

Compensation

... The master ... was within his rights in refusing to accept the seamen unless the transportation certificate provided for the amount allowed by law [see 46 U.S.C. §679]. The Department of course would be pleased if consular officers could arrange for the transportation of destitute seamen at rates less than that allowed by law but no complaint can be made against the masters of vessels for demanding the entire amount to which they are entitled.

The Director of the Consular Service (Carr) to the Consul at Iquique, Chile, May 10, 1921, MS. Department of State, file 196.7/1338. To similar effect, see Mr. Carr to the consul at Concepción, Chile (McDonough), Apr. 19, 1921, *ibid.* 196.71/446.

In a decision of May 1, 1924 concerning the amount to be paid for the transportation of destitute seamen to the United States under a statute stipulating a rate "not in excess of the lowest passenger rate and not in excess of 2 cents per mile", 46 U.S.C. §679, it was said:

"The 'lowest passenger rate' may reasonably be construed to mean the lowest rate for the general class of passengers without regard to race or nationality. Accordingly, a steamship company which maintains a special minimum passenger rate, or steerage rate, for persons of a particular race or nationality, less than the minimum rate for the general class of passengers, is not required to transport a destitute American seaman, not of the particular race or nationality, at the special rate, but is entitled to the amount agreed upon not in excess of the lowest passenger rate for the general class of passengers and not in excess of 2 cents per mile." 3 Comp. Gen. 819, 820.

Destination

In reply to an inquiry from an American Consul as to whether he could send a foreigner, who was a destitute American seaman, to his own country, the Department of State said that "Transportation to the United States is the only transportation which can be given a destitute American seaman."

The Director of the Consular Service (Carr) to the Consul at Cardiff (Lathrop), no. 140, June 26, 1917, MS. Department of State, file 196.7/560. To the same effect, see 5 Comp. Gen. 180.

Title 46 of the United States Code, § 593, provides that shipwrecked seamen shall be "transported to port of shipment as provided in sections 678, 679, and 681". As to whether under this section transportation to the United States, rather than to the port of shipment, in the case of a shipwrecked seaman who had shipped in a foreign port, was authorized, the Comptroller of the Treasury in Mar. 1921 said that—

"while the provision now under consideration does not give to a shipwrecked American seaman who had shipped in a foreign port a vested right to transportation at Government expense to a port in the United States, yet, if he is willing to accept such transportation in lieu of transportation to the port of shipment and the consular officer deems it in the interest of the United States, transportation may be furnished to the United States instead of to the port of shipment in such cases." XXVII Comp. Dec. 838, 839. The opinion was affirmed by the Comptroller General on Aug. 13, 1923. The Comptroller General (McCarl) to the Secretary of State (Kellogg), Aug. 13, 1923, no. A-23848, MS. Department of State, file 196.71/1008.

PROBLEMS PECULIAR TO VARIOUS CLASSES OF SEAMEN

DESTITUTE SEAMEN

§457

The Comptroller General of the United States has distinguished between the relief of seamen provided for under section 4577 of the Revised Statutes and that under section 4581 of the Revised Statutes, as follows:

Authority for relief of destitute American seamen abroad applicable to this case is found in section 4577, Revised Statutes [46 U.S.C. § 678, *ante*, p. 912], which makes it the duty of consular officers to provide, at the expense of the United States, for subsistence and return to the United States of American seamen found destitute within their districts. Relief under this statute is not conditional upon discharge of the seamen but upon destitution, and if destitution of the seamen be clearly established it is equally as applicable before discharge as after. Relief under this statute must not be confused with relief under section 4581, Revised Statutes, as amended [46 U.S.C. §683, *post*, p. 935], for seamen discharged before a consul on account of injury or illness incapacitating them for service, which relief is conditional upon discharge and is available to the seaman regardless of his financial status . . . 2 Comp. Gen., 438.

2 Comp. Gen. 475, 476 (Feb. 3, 1923).

"The same laws and regulations are applicable to seamen on the great lakes as elsewhere. Destitute American seamen are always entitled to relief and transportation to the United States." The Director of the Consular Service (Carr) to the Consul at Fort William, Ontario (Starrett), no. 57, Apr. 29, 1916, MS. Department of State, file 196.7/393.

"The only seamen prohibited by regulation from being declared destitute are those who have 'arrears of wages or extra wages, or those who are earning their own living.' Paragraph 262, Consular Regulations [see Consular Reg. U. S. sec. 262 (Feb. 1935) ; Ex. Or. Jan. 8, 1935].

"This provision of the regulation was not intended to include seamen who have arrears of wages in expectancy, the receipt of which is conditional upon the happening of something in the future. . . . In this case the 'chose in action' or share in the libel suit held by the men was of no value to prevent distress and possible starvation. It is believed the consul was justified in determining the men to be destitute after discharge." 2 Comp. Gen. 475, 476 (Feb. 3, 1923).

American seamen serving sentences in foreign prisons, or in jail awaiting trial, cannot be considered destitute since it is the duty of the local authorities to furnish them with the necessary subsistence. Similarly an injured seaman who has exhausted his funds in furnishing bail cannot be considered destitute, as by going to jail he could have the bail released. As to such a case the Comptroller of the Treasury said that "It is not shown that a return to jail would endanger the man's life or that it would probably permanently impair his health." He also held that there was nothing in the circumstance that they had been in jail to deprive destitute American seamen of their right to relief subsequent to their release. The Comptroller of the Treasury (Warwick) to

the Secretary of State (Polk), Feb. 19, 1920, MS. Department of State, file 196.7/987; XXVI Comp. Dec. 674; Consular Reg. U.S. sec. 262, n. 2, Feb. 1935.

"266. *Effect of desertion upon right to relief.* An American citizen serving as seaman on an American vessel is entitled to relief if destitute in a foreign port, notwithstanding he may have deserted without cause or may come upon the consular office otherwise irregularly. An alien under like circumstances is not entitled to relief. (See also sec. 250.)

"When relief is applied for by a deserter, it is the duty of the consular officer to ascertain clearly and satisfactorily, before granting it, that he is justly entitled to it, but, in all such cases, care should be taken that the provisions for the relief of destitute seamen should not be allowed to operate as an incitement to desertion. Consular officers should exercise great care in examining and weighing the merits of each case, in order that abuses may not occur.

"267. *Relief generally without reference to fault of seamen.* Consular officers are authorized and directed to relieve the necessities of destitute American seamen, subject to the exception of the foregoing section, without reference to the fault or misfortune by which they become destitute, except that relief must not be so administered as to incite desertion. (Sec. 305.)—*E O. Jan. 8, 1935*"

Consular Reg. U. S. secs. 266, 267, Feb. 1935.

Consular decision

The question of fact whether a seaman is or is not destitute within the meaning of R.S. 4577 (*46 U.S.C. §678*) is one to be determined in the first instance by the consular officer to whom the seaman applies for relief, and the consular officer's decision, in the absence of contrary facts, would be sufficient.—*2 Comp. Gen. 317.*

Consular Reg. U.S. sec. 262, n. 1, Feb. 1935.

See also the Assistant Secretary of State (Carr) to the Consul in charge at Callao-Lima (Makinson), May 29, 1928, MS. Department of State, file 196.7/2421.

The earlier position of the Comptroller of the Treasury is indicated by the following statements:

"the question of fact whether an American seaman is or is not destitute within the meaning of section 4577 is one to be determined by the consular officer to whom he applies for relief, and his decision will, in the absence of fraud, be conclusive." XIV Comp. Dec. 867, 870 (June 11, 1908). See also 3 Comp. Dec. 40 (1896).

"The question whether an American seaman in any given case is in such a destitute condition as to entitle him to the relief and protection which the State Department is authorized to furnish is one for administrative determination; and in the absence of fraud or gross mistake, neither of which is to be presumed, such determination will not be questioned by the accounting officers of the Treasury." The Comptroller of the Treasury (Warwick) to the Secretary of State (Hughes), Apr. 4, 1921, MS. Department of State, file 196.7/1309. To the same effect, see Mr. Hughes to the Consul at Habana (Hurst), telegram of May 7, 1921, *ibid.* 196.7/1340.

With reference to a report from an American Consul General, inquiring whether he could relieve a seaman who, although ill and incapacitated, had been discharged by a vice consul "by mutual consent", the Comptroller of the Treasury held that the seaman could be relieved under section 4581 of the Revised Statutes (46 U.S.C. § 683) making provision for seamen discharged on account of illness or injury, stating in part:

"It was said by the Circuit Court, District of Oregon, in *Raferty [Raftery] v. The T. F. Oakes* (36 Fed., 442, 448):

"The certificate of the consul is *prima facie* evidence of the justice of the discharge. And although this court may in this suit go behind it, and, on a proper case determine otherwise, yet the proof must be sufficient to overcome the *prima facie* case."

"The proof in this case furnished by the consular officer himself is quite sufficient to show that the discharge was actually on account of an injury incapacitating the seaman for service. This conclusion from the facts is irresistible."

The Comptroller of the Treasury (Warwick) to the Secretary of State (Lansing), Apr. 27, 1916, MS. Department of State, file 196.7/394.

Decisions of Comptroller General hold that liability of United States for necessary relief and transportation of American seamen depends upon a condition of distress or destitution and that it is Consul's duty, notwithstanding primary liability of master or owner, to see that necessary relief is not delayed unreasonably.

Secretary Hull to Consul Byington, telegram of Sept. 1, 1937, MS. Department of State, file 196.6/1243.

In the case of a seaman who was not discharged but who was left behind in a foreign port on account of disability, the owners of the vessel paid for his maintenance and hospitalization for some time and then discontinued doing so. The consul thereafter found him to be destitute and afforded him relief. The Comptroller of the Treasury, reviewing the case, said:

"While the liability of the ship to pay these hospital expenses, in the absence of the injured seaman's having been discharged by the consul, seems clear, still I do not think the consul, upon the ship owners' refusal to furnish maintenance and proper treatment to this American seaman, exceeded his authority or duty in furnishing such maintenance and treatment where he was satisfied that the seaman was destitute and sick." XVII Comp. Dec. 289. See also the Director of the Consular Service (Carr) to the Consul General at Halifax (Ragsdale), no. 64, June 7, 1911, MS. Department of State, file 196.7/103; the Chief of the Consular Bureau (Hengstler) to the Consul in charge at Hamburg (Huddle), Mar. 4, 1922, *ibid.* 196.7/1790.

In cases where a seaman comes before the Consul and is deemed to be a straggler and not a deserter and where the owners have refused to repatriate the seaman, the consular officer is warranted, when finding such seaman in destitute circumstances, in arranging for his relief and transportation to the United States. This is clearly indicated in Section 267 of the regulations which authorize consular officers to relieve destitute seamen without reference to the fault or misfortune by which they became destitute. With regard to transportation of such seamen, consular

Stragglers
and
deserters

officers should note carefully the provisions of Section 277, and Section 282, note 1. The latter reference applies particularly to cases where transportation is obtained on a vessel of the same company as the vessel which left the seaman behind.

The Assistant Secretary of State (Messersmith) to the Consul General at Casablanca (Goold), July 11, 1939, MS. Department of State, file 1965/342.

In a decision of June 7, 1924 the Comptroller General said:

Desertion of an American seaman from the ship on which he is serving breaks the contract of employment or the provisions of the shipping articles which control the obligation of both parties. Accordingly, upon submission of satisfactory evidence that a seaman has deserted, the liability of the owners of the vessel on which the seaman last served to return him to the United States is terminated.

3 Comp. Gen. 936, 937.

Seamen duly reported and certified as deserters, whether American citizens or aliens, are regarded as having no further claim to relief or transportation from the owners of the vessel of last service (3 Comp. Gen., 936), but the repatriation of such seamen as workaways on vessels of the same company is desirable if such an arrangement is agreeable to the owners. (See in this connection Paragraphs 249 and 250 of the Consular Regulations).

On the contrary, however, a vessel is not relieved of its obligation to subsist and repatriate "stragglers" who cannot be classified as deserters, whether American citizens or aliens. Such "stragglers" should therefore be shipped as workaways wherever practicable; and should they appear before the departure of their vessel and be returned thereon, the validity of their disratment to workaways by the master of such vessel (because of the employment of substitutes) would be for the final determination of the Shipping Commissioner at the port of arrival in the United States.

The Assistant Secretary of State (Carr) to the Consul at Hamburg (Smith), Mar. 29, 1930, MS. Department of State, file 196 5/265.

In 1923 an American vessel sailed from a foreign port leaving behind a seaman who had failed to return, and entry was made in the log certifying to his desertion. The American Consul was not notified by the captain of the desertion, due to lack of opportunity prior to sailing time. The Consul was later notified by an official of the company owning the vessel. The company subsequently submitted a claim for transporting this seaman to the United States as a destitute seaman on another of its vessels. The Comptroller General in reviewing the claim said that "It has been held that desertion of a seaman actually proven relieves the shipping company of liability to return him to the United States if found destitute abroad. 3 Comp. Gen. 936." After quoting sections 294, 300, and 301 of the Consular Regulations (Ex. Or. Sept. 5, 1922), which deal with desertion, he concluded:

"Accordingly, the two primary requirements to prove desertion are lacking in this case, viz, notice to the consular officer within 48 hours thereafter, and a certificate of the consular officer made at the time showing the actual desertion of the seaman as defined by the Consular Regulations. It must be held, therefore, that the evidence adduced does not sufficiently establish the desertion, or that the shipping company has been otherwise relieved of liability to return the seaman to the United States." 4 Comp. Gen. 390, 391 (Oct. 20, 1924). To similar effect, see 8 Comp. Gen. 194 (Oct. 17, 1923).

"... When relief is granted to American seamen who have deserted, proof of the desertion, established in accordance with article XVII, particularly sections 294 and 303, must be submitted to support all vouchers and claims for such relief." Consular Reg. U.S., sec. 266, n. 1, Feb. 1935.

"The question of fact as to whether a seaman has actually violated his contract with the operators of the vessel by desertion, is, *prima facie*, under the authority of the Consular Regulations, a matter for determination by the consular officer in whose jurisdiction the alleged desertion occurs. Particular attention is directed to those provisions of the aforesaid Paragraph 294 with respect to intent of the seaman to quit his vessel, which is made a requisite to a finding of desertion." The Department of State to the Consul at Colombo, Ceylon (Ells), July 8, 1929, MS. Department of State, file 196.7/2504. For further material on the establishment of desertion, see *ante*, p. 906.

ILL OR INJURED SEAMEN

§458

Under an Executive order of October 21, 1915, the Consular Regulations were amended to read as follows:

238. . . . By the general maritime law, a seaman, when he receives any injury when in the service of the ship, or becomes sick during the voyage, and the sickness is not caused by his own fault, is entitled to be cured at the expense of the ship, but if the seaman is discharged on account of illness or injury, incapacitating him for service, the expenses of his maintenance and return to the United States shall be paid from the fund for the maintenance and transportation of destitute American seamen, and provided, that at the discretion of the Secretary of Commerce, and under such regulations as he may prescribe, if any seaman incapacitated by injury or illness is on board a vessel so situated that a prompt discharge requiring the personal appearance of the master of the vessel before an American consul, or a consular agent is impracticable, such seaman may be sent to a consul or a consular agent, who shall care for him and defray the cost of his maintenance and transportation to the United States.—*R.S. 4581, amended* [Dec. 21, 1898]; *30 Stat. L., 759; 38 Stat. L., 1185.* [46 U.S.C. §683.]

See Consular Reg. U.S., sec. 238, Feb. 1931.

"... Such relief may be furnished an American seaman discharged by or before a consular officer on account of injury or illness incapacitating him for service regardless of whether said seaman may have funds of his own sufficient for his immediate needs; and the fact that the injury or

illness may have resulted from his own misconduct does not affect the seaman's right to such relief." 2 Comp. Gen. 438, 439-440 (Jan. 18, 1923).

In 1923 an American Consul inquired as to the relief to be accorded an American seaman who had been discharged because of an illness incurred through his own fault and had been afforded medical care, after which he was neither destitute nor incapacitated for service. The Department replied:

Inasmuch as Section 4581 of Revised Statutes [46 U.S.C. §683] as amended provides that "if the seaman is discharged on account of injury or illness incapacitating him for service, the expenses of his maintenance and return to the United States shall be paid from the fund for the maintenance and transportation of destitute American seamen," the Department believes that the statute is not complied with until the seaman is actually furnished transportation to the United States and that all necessary and reasonable expenses for maintenance in the interim between his discharge and return are properly payable from the appropriation for the relief of destitute seamen.

The Consul at Marseille (Frost) to the Secretary of State (Hughes), no. 455, Dec. 4, 1922, and the Director of the Consular Service (Carr) to Mr. Frost, Jan. 12, 1923, MS. Department of State, file 196.7/1926.

The inquiry of an American Consul as to whether the "maintenance" which he was required to provide to seamen discharged on account of injury or illness, under section 4581 of the Revised Statutes (46 U.S.C. § 683), included burial expenses was referred by the Department of State to the Comptroller of the Treasury, who replied in the affirmative. The Comptroller of the Treasury (Tracewell) to the Secretary of State (Knox), Nov. 29, 1912, MS. Department of State, file 196.7/148.

Discharge a prerequisite to relief

In the case of an American seaman whose medical treatment was authorized by an American Consul and who immediately returned to duty, neither the seaman nor the master having funds, the Comptroller General in 1937 ruled that, since the seaman was not found destitute in the consular district nor was he discharged on account of the injury, there was no authority of law for the payment of this expense from public funds.

The Consul at Yarmouth, Nova Scotia (Jakes), to the Secretary of State (Hull), no. 395, Nov. 10, 1936, MS. Department of State, file 196.7/2773; the Acting Comptroller General (Elliott) to Mr. Hull, no. A-83584, Mar. 12, 1937, *ibid.* 196.7/2788.

Vessel primarily liable

In 1908 an American seaman was taken to a hospital in Habana by the master of the vessel for medical treatment and, on account of his illness, was discharged from the vessel and his wages turned over to the Consul General. The inquiry of the Consul General as to whether the Government was responsible for the hospital expenses,

under the act of December 21, 1898 (see *ante*, p. 935), was referred to the Comptroller of the Treasury, who ruled, in part, as follows:

It is well settled that the vessel and her owners are liable, in case a seaman falls sick or is wounded in the service of the ship, to the extent of his maintenance and cure. (The *Osceola*, 189 U.S., 158, 175; the *Iroquois*, 194 U.S., 240.)

In the case of the *Osceola*, *supra*, the court said (p. 175):

"Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:

"1. That the vessel and her owners are liable, in case a seaman falls sick or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued."

In the case of the *Iroquois*, *supra*, the court said (p. 241):

"The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the ship owners by all maritime nations. It appears in the earliest codes of continental Europe and was expressly recognized by this court in the recent case of the *Osceola*, 189 U.S., 159."

The liability for maintenance and cure for injury or sickness incurred in the service extends beyond the discharge. (The *W. L. White*, 25 Fed. Rep., 503; *McCarron v. Dominion Atlantic Ry. Co.*, 134 Fed. Rep., 762; the *Troy*, 121 Fed. Rep., 901, 906; the *Eva B. Hall*, 114 Fed. Rep., 755.)

There are numerous cases in which the vessel has been held liable for damages resulting from the failure to perform its duty to effect a cure of a seaman becoming injured or sick in its service. (*Whitney v. Olsen*, 108 Fed. Rep., 292; the *Eva B. Hall*, 114 Fed. Rep., 755; the *Troy*, 121 Fed. Rep., 901; the *Troop*, 128 Fed. Rep., 856; the *Iroquois*, 194 U.S., 240.)

The word "maintenance" is broad and comprehensive and might be held to include hospital charges and medical treatment, but there is nothing in the act or the connection in which it is used to indicate that it was the intention of Congress to absolve the ship from its duty under maritime law to furnish maintenance and cure to a seaman becoming injured or ill in its service, and cast that duty upon the Government in case the seaman was discharged before a consul.

The act of December 21, 1898, should not, in my opinion, be construed as making such a discharge the equivalent of the performance of this duty and as shifting the burden of such duty on the Government.

I am of the opinion, therefore, that the vessel and its owners are, notwithstanding the act of December 21, 1898, *supra*, still primarily liable for such expenses as are necessary to provide

maintenance and cure to a seaman falling sick or injured in its service.

XIV Comp. Dec. 570, 572-573, 575-576.

A similar ruling was made by the Comptroller in a decision of Nov. 30, 1908 wherein it was said:

"A discharge on account of sickness or injury under the act of December 21, 1898 (30 Stat., 759), does not relieve the vessel from its liability for the maintenance and cure of a seaman falling sick or injured in its service. (14 Comp. Dec., 570, 573, and cases cited therein.)" XV Comp. Dec. 348, 353-354.

In a case arising in 1910 wherein the consul discharged a seaman and sent him to a hospital, the Comptroller held that the expenses were properly payable from the fund for maintenance and transportation of American seamen under section 4581 of the Revised Statutes (46 U.S.C. §683) and said that "Wherein the two decisions [XIV Comp. Dec. 570 and XV Comp. Dec. 348] differ from the principles announced in this decision, if they do differ, [they] are overruled." XVI Comp. Dec. 537.

In the case of Oscar Frederickson, an American seaman who was left behind at Tahiti by the American brig *Geneva* on account of injuries incurred in the service of the vessel, the Attorney General of the United States, in an opinion of May 2, 1911, held that, in the absence of evidence that the seaman had been guilty of misconduct or that his injury was the result of his gross negligence, "the presumption is that the application of the master for his discharge was correctly refused by the consul". It was added:

This being true, the owners of the vessel were liable, not only for the seaman's wages up to the termination of the voyage, but also for all expenses incident to medical care, nursing, and attendance necessary to a recovery from the injury. This does not mean that the expenses shall be borne until a complete cure is effected, as such recovery may be impossible; but it does mean that this liability exists until the condition of the seaman is such that he can be properly discharged from medical attention.

The Attorney General said in conclusion:

As the medical and transportation expenses here in question have all been settled out of funds belonging to the United States, and as they were paid to relieve a distressed seaman, and after notice had been given to the Matthew Turner Co. that they were primarily liable for same and demand made for payment, it is my opinion that said company may be held liable therefor.

This conclusion is, of course, based on the assumption that there was no legitimate reason for the consul to discharge Frederickson at the instance of the master of the vessel.

29 Op. Att. Gen. (1913) 54, 56-57, 58.

"The master of a vessel is always entitled to have a seaman discharged, who is taken sick while in the service of the vessel and is incapacitated for service.

"If you decide that the case comes within the provision of paragraph 238, of the Consular Regulations, as amended, you will discharge the seaman, dating the discharge as of the day when the master made the request for his discharge, and you will assume the expenses necessarily incurred after that date for the care and transportation of the seaman to the United States."

The Director of the Consular Service (Carr) to the Vice Consul at Santiago de Cuba (Herron), no. 149, Sept. 14, 1917, MS. Department of State, file 196.4/158.

"... your attention is directed to paragraph 254 of the Consular Regulations, which provides that if an American seaman is discharged for illness or injury incapacitating him for service, the expenses of his maintenance, including medical treatment, and repatriation shall be paid from the fund for the maintenance and transportation of destitute seamen. If the seaman was not discharged, but was placed in a hospital by the master or agents of the vessel and later discharged, the Comptroller has decided that the Government should pay the expenses incurred by him after the time of such discharge."

The Consul General at Auckland, New Zealand (Winslow), to the Secretary of State (Lansing), no. 533, Nov. 13, 1918, and the Director of the Consular Service (Carr) to Mr. Winslow, no. 238, Feb. 5, 1919, MS. Department of State, file 196.7/719. To similar effect, see Mr. Carr to the Consul at Palma, Spain (Goodier), no. 44, Feb. 18, 1920, *ibid.* 196.7/932; Mr. Carr to the Consul General at Guayaquil (Goding), July 7, 1920, *ibid.* 196.4/372; the Consulate General at Hong Kong to Secretary Colby, no. 1002, Nov. 8, 1920, and the Chief of the Consular Bureau (Hengstler) to the Consul General at Hong Kong (Gale), Dec. 24, 1920, *ibid.* 196.7/1219; Mr. Carr to the Consul General at London (Skinner), Mar. 24, 1921, *ibid.* 196.7/1292; the Secretary of State (Hughes) to the Consul at Rotterdam (Hopper), telegram of June 24, 1921, *ibid.* 196.7/1336; Mr. Carr to the Consul at Port Limón, Costa Rica (McMillan), Dec. 2, 1921, *ibid.* 196.7/1632; Mr. Hengstler to the Consul in charge at Hamburg (Huddle), Mar. 4, 1922, *ibid.* 196.7/1790; Mr. Carr to Mr. Huddle, May 27, 1922, *ibid.* 196.7/1841.

The Comptroller General held on January 16, 1923 that if a seaman becomes ill or is injured while a member of a crew of a vessel and is placed in a hospital by the master of the vessel and is later discharged by the Consul for illness or injury, "The consular officer would not be authorized to pay from United States funds any part of the hospital bill in the case presented . . . See 14 Comp. Dec., 570; 15 *id.*, 348."

2 Comp. Gen. 438, 440, 571. To similar effect, see the Comptroller General (McCarl) to the Secretary of State (Hughes), no. AD7891, Sept. 28, 1923, MS. Department of State, file 196.7 Kahn, Kuzzle.

After repeating the above rule in a decision of October 8, 1923, the Comptroller General added that—

the consular officer is authorized to use the appropriation in question to pay the expenses of maintenance of the seaman after discharge from the hospital and pending the completion of arrangements for his return to the United States unless such ex-

penses have been paid or assumed by the master or some other officer or agent of the vessel.

Mr. McCarl to Mr. Hughes, no. AD7893, Oct. 8, 1923, MS. Department of State, file 196.7/2059.

The Department of State instructed a consul in 1923 with reference to the above decision of Jan. 16, 1923:

"The foregoing decision was rendered with the understanding that the seaman continued to remain in the hospital after being discharged from the service of the vessel and that the hospital charges would cover care and treatment after discharge as well as prior thereto.

"It will be understood of course that if a seaman is discharged by a consular officer on account of illness or injury and is placed in a hospital by the Consul, the expenses devolve upon the Government and are to be defrayed from the fund for the relief of destitute American seamen."

The Director of the Consular Service (Carr) to the Consul at Martinique, Fr. W. I. (Wallace), July 31, 1923, MS. Department of State, file 196.7/2023.

In a decision of September 3, 1924 the Comptroller General said:

It has been uniformly held that . . . [Revised Statutes, sec. 4581 (46 U.S.C. §683)] does not shift the burden of providing for the maintenance and transportation of such injured or ill seamen from the steamship owners to the Government and that the primary responsibility for such maintenance and transportation is upon the owners of the vessel upon which such injury or illness was incurred.

4 Comp. Gen. 252, 253.

In a decision of February 12, 1926 the Comptroller General held that an American consular officer, before discharging a seaman who had become ill or disabled through no fault of his own while in the service of an American vessel, should require the vessel or its agents to assume the expenses of the seaman's hospitalization; also that whether the seaman is discharged or not he "should be placed in a hospital at the expense of the United States only when it is shown that it is impossible for the consular officer to compel the vessel to assume liability for the hospitalization".

5 Comp. Gen. 623, 625. Consular functions as to discharge of seamen are discussed further, *ante* §448.

In the last-mentioned decision of the Comptroller General it was said:

Where it is impossible to repatriate a discharged disabled seaman by his own vessel or by a vessel of the same company, the cost of transportation by another steamship line as well as the necessary expenses of maintenance while awaiting transportation to the United States is payable from the funds appropriated for

the relief and protection of American seamen. 4 Comp. Gen. 252.

5 Comp. Gen. 814, 815.

It has been held repeatedly that the primary duty, responsibility, and liability with respect to the care, maintenance, and transportation of an American seaman who has been discharged before a consular officer because of injury or disability incapacitating him for duty, is that of the shipowners or operators of the vessel upon which the seaman last served, and that the practical effect of the discharge of the seaman in such cases is to relieve the owners or operators of the vessel of the liability for future wages only and does not shift the responsibility for the care, maintenance, and transportation to the United States. Where, therefore, American seamen who become ill or are injured while members of the crew of a vessel are placed in a hospital by the master of the vessel, either before or after discharge, the expense of their treatment is not payable from public funds. 2 Comp. Gen. 438; *id.* 571; 4 *id.* 247; 5 *id.* 623 [7 Comp. Gen. 3].

5 Comp. Gen. 814, 815.

On October 29, 1927 the Department of State requested a ruling of the Comptroller General as to the accuracy of the following statements:

It is understood that the intent of Congress in enacting R.S. 4581 was to assure the proper care and repatriation of seamen discharged in foreign ports for illness or injury, and that a consular officer is authorized to extend relief from Government funds under the following circumstances, notwithstanding there is a primary liability on the part of the vessel therefor:

(1) When a seaman is in critical condition from illness or injury and any delay in his treatment on shore seriously endangers his life or permanent disability, a consular officer may, if the vessel and its owners refuse to make suitable arrangements, cause the seaman to be given necessary treatment from the fund for the relief and protection of seamen. The consular officer should offer satisfactory proof that such an emergency existed and should report the facts to the department in order to permit the Government to seek reimbursement from the vessel if considered expedient (29 Op. Atty. Gen. 54);

(2) Consular officers should likewise obtain prompt treatment for seamen under the conditions outlined in (1) where the vessel is unable to do so; (a) because it is without funds; (b) because local authorities will not permit the seamen landed, or local hospitals and physicians will not undertake the treatment, unless the consular officers assume responsibility therefor.

In his reply of December 2, 1927 the Comptroller General said that, assuming that the questions related "solely to the question of furnishing maintenance or medical and hospital treatment, they would appear to be in accord with the decisions of this office", and that "It is,

of course, the duty of the consul to see that relief is promptly furnished sick or injured or destitute seamen, and the furnishing of such relief should not be delayed unreasonably nor for such time as might endanger the life or result in additional suffering on the part of the seamen."

7 Comp. Gen. 303, 364.

A convention regarding liability (sick and injured seamen) was concluded by members of the International Labor Organization on Oct. 24, 1936. It was proclaimed by the President of the United States on Sept. 29, 1939. Treaty Series 951. See H.R. 1328, 76th Cong., 1st sess.

Illness or
injury
through sea-
man's fault

In reply to an inquiry as to whether relief should be withheld from American seamen when discharged for injury or illness contracted through their own fault, the Department of State, in January 1920, replied in the negative, adding that "the cause of discharge must be injury or illness, and the injury or illness shall not be contracted after discharge".

The Consul at Bordeaux (Jaeckel) to the Secretary of State (Lansing), no. 56, Dec. 20, 1919, and the Director of the Consular Service (Carr) to Mr. Jaeckel, no. 55, Jan. 26, 1920, MS. Department of State, file 196.7/959.

The District Court of the United States for the Eastern District of Virginia, in 1920, approved the action of the master of an American vessel in deducting from the wages of an alien shipped in a foreign port the amount paid by the vessel, as required by the laws of the United States, for the cure of a disease contracted through the seaman's own fault. The court said:

There is nothing better settled, perhaps, in the maritime law, than that seamen are entitled to payment of wages lawfully due them, together with a reasonable allowance for their maintenance and cure, if taken ill while in the ship's service, or within a reasonable time thereafter, arising from causes incident to their employment; but the right to cure does not include liability for disease arising from their own vices or gross acts of indiscretion. This view is amply supported by the authorities. *Chandler v. The Annie Buckman*, 5 Fed. Cas. 449, No. 2,591a; *Pierce v. Patton*, 19 Fed. Cas. 636, No. 11,145; *The Mary Sanford* (D.C.) 58 Fed. 926; the *Bouker* No. 2, 241 Fed. 831, 833, 154 C.C.A. 533, and note; 35 Cyc. 1200, 1201, and cases cited; *The Ellen Little* (D.C.) 246 Fed. 151, and cases cited—the last-named case bearing especially upon the right to deduct from seamen's wages on account of damages sustained by reason of failure faithfully to perform their duties:

The Alector, 263 Fed. 1007-1008 (E.D. Va., 1920).

In the following cases the vessels were held not to be liable for maintenance and cure, or for damages or wages to the end of the voyage, in cases of injuries not incurred in the service of the ship. *Lortie v. American Hawaiian S.S. Co.*, 78 F. (2d) 819 (C.C.A. 9th, 1935); *The S.S. Berwindglen, Rawding v. Hooten*, 88 F. (2d) 125 (C. C. A. 1st, 1937); *Barlow*

v. Pan Atlantic S.S. Corporation et al., 101 F. (2d) 697 (C.C.A. 2d, 1939); *Collins v. Dollar S.S. Lines, Inc., Ltd.*, 23 F. Supp. 395 (S.D.N.Y., 1938). See also *The Quaker City, Chambers v. United States*, 1 F. Supp. 840 (E.D. Pa., 1931). As to the meaning of the phrase "in the service of the ship", see *Meyer v. Dollar S.S. Line*, 49 F. (2d) 1002 (C.C.A. 9th, 1931) and *Collins v. Dollar S.S. Lines, Inc., Ltd. (ante)*.

In the case of a seaman who had become incapacitated through his own fault and who had not been discharged, an American Consul reported that he had required the seaman to provide his own maintenance and cure until his funds were exhausted and had then furnished him relief as a destitute American seaman. The Department approved this procedure and said "It is also evident that the ship can not be held liable for the cure of seamen who have acquired disease arising from their own vices or gross acts of indiscretion." The Director of the Consular Service (Carr) to the Consul General at Shanghai (Cunningham), Feb. 16, 1922, MS. Department of State, file 196.7/1771.

In view of the facts presented that . . . an American seaman was injured while a member of the crew . . . and was placed in the . . . hospital . . . by [the] . . . master of that vessel, whether or not the injury was the result of the seaman's own fault, the vessel is primarily responsible for the cost of his hospital treatment, both before and for a reasonable time following the seaman's discharge.

4 Comp. Gen. 247, 248 (Sept. 2, 1924).

In a case where a seaman was injured during a drunken brawl occurring on board a vessel and was hospitalized by the master prior to discharge before the American Consul, the Comptroller General referred to the above decision and said:

"There is nothing submitted in the present case to distinguish it from the principle laid down in that decision. Accordingly, you are advised that the hospital expenses . . . may not be paid by the Consul and charged to the fund for the Relief and Protection of American Seamen." The Comptroller General (McCarl) to the Secretary of State (Hughes), no. A-7570, Feb. 27, 1925, MS. Department of State, file 196.7/2198.

It was held by the Comptroller General of the United States in a decision of Feb. 12, 1926 that where a seaman becomes ill or disabled, through his own fault, while in the service of an American vessel, the fact that he is at fault does not relieve the vessel upon which he serves of liability for his hospitalization, maintenance, and repatriation, and the Consul should not assume liability for these expenses. The Comptroller General also said:

". . . It has been held that where an American seaman is discharged on account of injuries received as a result of his own willful misconduct and disobedience of orders, or because of disease arising from his own vices or gross indiscretion, the ship is not liable for care and maintenance after discharge. *The Alector*, 263 Fed. Rep. 1007; 15 Comp. Dec. 740. But in such a case the consular officer should nevertheless provide for the seaman's return to the United States." 5 Comp. Gen. 623, 626.

On Oct. 29, 1927 the Department of State referred to the letter of Feb. 12, 1926 (5 Comp. Gen. 623) from the Comptroller General just referred to and inquired whether in making the distinction between the liability

of the ship for cure and maintenance after discharge and the return of the seamen to the United States "it is your view that incapacity caused by wilful misconduct and disobedience of orders, or disease arising from vices or gross indiscretion, will never relieve the vessel or owning company of the obligation of repatriation, or if the obligation might in certain cases be terminated, as indicated in the following cases: 18 Fed. Rep. 605; 111 Fed. Rep. 550; Fed. Cases No. 14057 (opinion of Justice Betts); Fed. Cases No. 10262".

The Comptroller General replied that—

"the court decisions cited by you did not pass upon the rights of the seamen therein involved to be returned to the United States at the expense of the Government, but were confined to certain disputed claims asserted by the seamen against the masters or owners of the vessels. While authority is granted by statute for the return of seamen to the United States at Government expense under certain circumstances, such authority does not affect the primary duty, responsibility, and liability of the shipping company owning or operating the vessel on which the seamen last served to return the seamen to the United States. 3 Comp. Gen. 148; 4 *id.* 118. See also section 295 of the United States Criminal Code, 35 Stat. 1146. Irrespective of the seamen's conduct or disobedience of orders there is a duty devolving on the shipping company to return to the United States a seaman then or previously in its employ. A reason for this is that the seamen are abroad as a result of their connection with the shipping company, which is a primary agency to prevent the seamen from becoming a public charge in a foreign country. Furthermore, the vessel is benefited, indirectly at least, by the return of seamen to ports of the United States where their services are more readily available for reshipping on American vessels when needed." 7 Comp. Gen. 363, 364-365 (Dec. 2, 1927).

In answer to a further inquiry from the Department as to this ruling the Comptroller General, on June 28, 1928, said that—

"the fact that the seaman may be suffering from a venereal disease the result of his own vices or misconduct does not relieve the owners or operators of the vessel on which he last served of their obligation to furnish such maintenance and hospitalization as may be necessary in connection with or incident to his return to a port of the United States." The Comptroller General (McCarl) to the Secretary of State (Kellogg), June 28, 1928, MS. Department of State, file 196.7/2433.

In reply to a consul's inquiry concerning the effect of the case of *The Alector* upon the opinions of the Comptroller General relating to the relief of seamen, the Department of State in 1929 said that—

"In the Department's opinion, the decision referred to may not be considered as relieving the vessel of its primary obligations under maritime law, and the statutes, as interpreted by the Comptroller General, in the matter of payment of wages to seamen upon consular discharge and providing necessary relief and maintenance; but the decision cited is believed to justify consular officers, in computing the amount of wages due, to deduct expenses necessarily incurred for the treatment of illness or injury caused by wilful misconduct or gross indiscretions and vices." The Assistant Secretary of State (Carr) to the Consul General at Hong Kong (Tredwell), Nov. 1, 1929, MS. Department of State, file 196.7/2493.

SHIPWRECKED SEAMEN

§459

Title 46 of the United States Code, § 593, provides that shipwrecked seamen shall be considered as destitute and shall be treated and transported to port of shipment as provided in title 46 of the United States Code, §§678, 679, and 681, relating to destitute American seamen.

As soon as the owners of a wrecked vessel take up the burden of subsisting and transporting the members of the crew they cease to be destitute seamen on the hands of the consul and claimant may not be reimbursed from public funds for any part of the cost to it of the transportation and subsistence expenses of the crew of the steamship *Pennsylvania* to a port in the United States.

3 Comp. Gen. 148, 150 (Sept. 17, 1923). See also 4 Comp. Gen. 542 (Dec. 18, 1924).

In a decision of February 15, 1929 the Comptroller General said:

The liability of the United States for the necessary relief and transportation of shipwrecked seamen depends upon a condition of distress or destitution and no such condition can exist if the owner or master of the vessel assumes, or can be required to render, the necessary relief and transportation.

Comptroller
General,
1929

The question whether it is necessary for a consular officer to endeavor to secure such relief at the expense of the owner or master before granting relief at Government expense, must be determined in each particular case, consideration being given to the duty of the consular officer,—notwithstanding the primary liability on the part of the master of the vessel,—to see that the necessary relief is not delayed unreasonably nor for such time as might endanger the lives or result in additional suffering on the part of the seamen. 7 Comp. Gen. 363.

The crew of an American vessel shipwrecked in Alaska in 1929 having been returned to the United States by another vessel of the same company, the company presented a claim to the United States Treasury for reimbursement under the above provisions. The claim was disallowed by the Comptroller General who said that "The duty of relieving and transporting the crew of shipwrecked vessels is primarily that of the owner or operator and where this duty has been undertaken the appropriation for the 'Relief and Protection of American Seamen' is not available to reimburse the owner or operator for the expense incurred in performing such duty".

Supreme
Court,
1933

The company then brought suit in the Federal courts, and its position was sustained by the Supreme Court of the United States, which said:

The rejection of petitioner's claim by the Comptroller General rests upon the supposed duty of the owner to transport to the home port the seamen of its own wrecked vessel. Diligent search

by counsel of the ancient learning of the admiralty has failed to disclose the existence of any such duty. At most, in the absence of statutory command or of stipulations in the shipping articles providing otherwise, the rights of the seamen after shipwreck, preventing the completion of the voyage, appear to have been limited to wages payable from freight earned on the voyage or to wages or salvage from the vessel they have helped save. It is unnecessary for us to consider to what extent these rights have survived the statutes regulating the duties of the owner toward the seamen or what bearing they may have on the duty of the owner to transport the seamen. For there is no finding and no evidence in the present case that the wrecked vessel had earned freight on her voyage or had been salvaged either with or without the aid of her seamen. Under those statutes we think it plain that no duty is imposed on the owner to provide transportation for seamen of his own wrecked vessel and that the statutory undertaking of the government is not upon condition that destitute seamen shall be transported upon vessels other than those of the owner of the wrecked vessel.

The Comptroller General (McCarl) to the Secretary of State (Kellogg), Feb. 15, 1929, MS. Department of State, file 196.7 Stimson; *Alaska Steamship Co. v. United States*, 290 U. S. 256, 262-263 (1933). For decisions in lower courts, see 60 F. (2d) 135 (W.D. Wash., 1932); 63 F. (2d) 398 (C.C.A. 9th, 1933). See also *American Scantic Line, Inc. v. United States*, 5 F. Supp. 410 (S.D.N.Y., 1933).

It was provided in the Appropriation Act of 1934 (48 Stat. 533) that no part of the appropriation for the relief of seamen should be paid to steamship-owners or -operators for transporting a destitute or shipwrecked seaman if the seaman's last service was on a vessel of such owner or operator and was not terminated by desertion.

In a decision of August 19, 1937 the Acting Comptroller General said that the proviso had not been included in subsequent appropriations "and must, therefore, be held to be applicable only to appropriations then in existence and not to affect appropriations for fiscal years subsequent to 1935". (To similar effect, see *American Scantic Line, Inc. v. United States*, 27 F. Supp. 271 [S.D.N.Y., 1938].) However, the Comptroller denied the claim under review in this decision, see *ante* p. 923.

In a decision of July 14, 1938 the Acting Comptroller General said that—

it must be presumed that the appropriations contained in said acts for the relief of destitute and shipwrecked seamen are available for the payment of such obligations as consular officers are authorized by law to incur in connection with the furnishing of relief to destitute American seamen. And in determining what obligations the consular officers are thus authorized to incur the decision of the Supreme Court of the United States in *Alaska Steamship Co. v. United States*, 290 U.S. 256, is, of course, for

consideration. In such connection, however, there is for consideration, also, any statutes enacted subsequent to those considered by the court in that case affecting the obligations of the owners of vessels and any valid contracts, orders, or regulations affecting such obligations.

13 Comp. Gen. 369-370; the Acting Comptroller General (Elliott) to the Secretary of State (Hull), Aug. 19, 1937, MS. Department of State, file 195.7 Bessemer City; Mr. Elliott to Mr. Hull, July 14, 1938, *ibid.* 195.7 President Hoover/105.

For a history of the development of maritime law on the *Legal Status of Seamen* (a review published by the Maritime Commission of Norway), see S. Doc. 552, 61st Cong., 2d sess.

FEES

§460

Title 22 of the United States Code, section 99, provides:

. . . *General duty to account for fees.* All fees, official or unofficial, received by any officer in the Consular Service for services rendered in connection with the duties of his office or as a consular officer, including fees for notarial services, and fees for taking depositions, executing commissions or letters rogatory, settling estates, receiving or paying out moneys, caring for or disposing of property, shall be accounted for and paid into the Treasury of the United States, and the sole and only compensation of such officers shall be by salaries fixed by law; but this shall not apply to consular agents, who shall be paid by one-half of the fees received in their offices, up to a maximum sum of \$1,000 in any one year, the other half being accounted for and paid into the Treasury of the United States. (Apr. 5, 1906, c. 1366, §8, 34 Stat. 101; Feb. 5, 1915, c. 23, §§3, 6, 38 Stat. 805, 806; May 24, 1924, c. 182, §11, 43 Stat. 142.)

As to fees of consular agents, see For. Ser. Reg. U.S. V-22, May 1939.

Fees collected by consuls or Foreign Service officers are prescribed by the President pursuant to general authorization contained in title 22 of the United States Code, section 127.

The schedule of fees for various kinds of services is set forth in the Tariff of United States Foreign Service Fees, For. Ser. Reg. U.S. V-15, Feb. 1939.

In 1917 a firm of American attorneys informed the Department of State that it had been necessary to take certain depositions in London before the American Consul. Because of the necessities of the situation it was agreed by stipulation between the attorneys that the witnesses would be sworn by the Consul at his office and that the testimony would then be taken at a solicitor's office without the presence of a representative of the Consulate and the depositions then certified by the Consul and sent forward. The firm inquired whether the

Consul was correct in charging for this service the fee specified in the Tariff of Consular Fees for the taking of depositions, which was based upon the number of words in the record of testimony. The Department replied that it had been decided that the papers were affidavits and that the Consul had been instructed to charge the fees prescribed for affidavits and to return the balance.

Jones, Hocker, Sullivan & Angert to Secretary Lansing, Sept. 28, 1917, MS. Department of State, file 081.41/102; the Director of the Consular Service (Carr) to Jones, Hocker, Sullivan & Angert, Feb. 28, 1918, and Mr. Carr to Consul General Skinner, no. 2406, Feb. 28, 1918, *ibid.* 081.41/114.

In connection with the arrest of an Italian consular officer in Pennsylvania on a charge of extortion in the matter of fees charged for consular services, the charge having later been dropped for lack of prosecution, the Department of State informed the Governor of Pennsylvania that the Italian Government was the competent authority to pass upon the question and that if the local authorities considered the fees illegal they could have had recourse either to the appropriate Italian authorities in this country or to the Department of State, which would have brought the matter to the attention of the Italian Government.

The Acting Secretary of State (Grew) to the Governor of Pennsylvania (Pinchot), Apr. 11, 1925, MS. Department of State, file 702.8511/531.

In reply to a letter complaining that the Mexican Government had increased the fees charged by Mexican Consuls for certifying invoices, the Department of State said—

you are advised that the schedule of consular fees prescribed by the Mexican authorities is considered to be a matter of domestic jurisdiction and it may be that the imposition of additional fees is warranted. Inasmuch as this new charge does not appear to be discriminatory against American exporters, an official request for its revocation is not deemed expedient.

The Under Secretary of State (Phillips) to Eben Richards, June 21, 1922, MS. Department of State, file 612.0022/-. The Department of State has, on occasion, instructed its representatives in foreign countries to bring the attention of the authorities to the serious effect on trade occasioned by excessively high consular fees. The Secretary of State (Kellogg) to the Minister in Ecuador (Bading), telegram of Jan. 2, 1926, *ibid.* 622.1122/3; Mr. Kellogg to the Ambassador in Mexico (Sheffield), telegram 108, Apr. 30, 1927, *ibid.* 612.0022/4.

In November 1933 the American Minister in the Dominican Republic informed the Department of State of a presidential decree making applicable in Dominican Consulates in the United States a surcharge of two dollars, in addition to other fees, for the certification

of a consular invoice of merchandise to be shipped to the Dominican Republic. The Department replied:

As the decree in question clearly indicates that this surcharge is to be applied only on consular invoices certified in the Dominican Consulates in the United States and therefore involves a discrimination against American exports to the Dominican Republic in favor of exports from all other countries, the Department desires you informally to bring this matter to the attention of the Dominican Government with a view to having this discriminatory measure discontinued.

The Secretary of Legation in the Dominican Republic (Brown) to the Secretary of State (Hull), no. 1265, Nov. 6, 1933, and the Acting Secretary of State (Sayre) to Minister Schoenfeld, no. 222, Dec. 21, 1933, MS. Department of State, file 639.1122/5.



